THE

TOUCH-STONE

OF

COMMON ASSURANCES:

OR, A

PLAIN and FAMILIAR TREATISE,

OPENING THE

LEARNING of the COMMON ASSURANCES,

OR

CONVEYANCES OF THE KINGDOM:

By WILLIAM SHEPPARD, Esq;
of the MIDDLE-TEMPLE.

THE FOURTH EDITION:
Revised and corrected, with NOTES and additional REFERENCES,
By EDWARD HILLIARD, of LINCOLN'S-INN,
BARRISTER AT LAW.

TO WHICH IS ADDED,

A COPIOUS INDEX.

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MDCC LXXX.

A COPIOUS INDEX,

TO WHICH IS ADDED,

A COLLECTION of the most EXCELLENT MODERN

CONVEYANCES

OF THE

KINGDOM:

CONTAINING

PRECEDENTS of COMMON ASSURANCES,

BY

DEEDS and DEVISES,

AND

OF

MORTGAGES, SETTLEMENTS,

AND

LEASES,

(DEDICATION TO THE FORMER EDITIONS)

THE
EDITOR's ADDRESS
TO THE
PUBLIC.

THE fate of the book, now reprinted, has been ſomewhat ſingular. For a long time the *Touchſtone* lay on the ſtalls of the ſecond-hand bookſellers in *Moorfields* unnoticed, and of no repute. The late Lord Chief Juſtice *Willes* was the perſon who reſcued it from unmerited neglect, by the high character he gave it in the court where he preſided: His powerful encomium, together with the importance of the ſubject-matter of the book, the method obſerved in it, and the authorities upon which its doctrine is eſtabliſhed, have contributed to give the work that reputation which is fully confirmed by its preſent ſcarcity.—Tho' this treatiſe bears the name of *Sheppard*, yet doubts have ariſen whether it be really his performance; if we conſider that this was given as Mr. *Sheppard's* firſt publication, and compare it with his ſubſequent productions, the earlieſt work will be found to bear the marks of the matureſt judgment. This circumſtance, together with the report which has prevailed even to this day, that he is not entitled to the credit he has aſſumed, ſeems to juſtify the doubt; and the aſſurances made by the friends of the late Judge *Doderidge*, that the manuſcript, ſo congenial to his abilities, was found among his papers, favor the ſuppoſition long entertained, that Mr. Juſtice *Doderidge* was really the author of the *Touchſtone*. —From a printed copy of this work, which belonged to that very eminent conveyancer the late Mr. *Booth*, and is now in the poſſeſſion of Mr. *Holliday* of *Lincoln's Inn*, the editor has been permitted, for the information of the curious reader, to tranſcribe the following note, written in Mr. *Booth's* own hand in the title-page, "*No part of this book is* Sheppard's *but the Title*, "*for it was originally wrote by Juſtice* Doderidge, *whoſe library* Sheppard *pur-*
"*chaſed, where, among other books, he found the original manuſcript of this*
"*treatiſe, and afterwards publiſhed it as his own. Sir* Creſwell Levinz *had*
"*ſeen the manuſcript in Juſtice* Doderidge's *hands, and from him Mr.* Pigott,
"*who was my author, had this information.*"—A report, propagated by perſons ſo reſpectable, amounts almoſt to a certainty.—Be this as it may, the credit of the work is now ſo well eſtabliſhed, that, were its preſumptive lineage indiſputably proved, it could not eaſily increaſe in reputation.—Mr. *Pigott*, the author of the celebrated Treatiſe on Recoveries, had ſo juſt a ſenſe of the merit of the *Touchſtone*, that he took the pains to compile a copious and correct

index

index thereto, now firſt publiſhed, but with ſome additions. The original, in Mr. *Pigott's* own hand-writing, is alſo in the poſſeſſion of the gentleman above named.——It is not within the bounds of this addreſs, nor the intention of the editor, to ſpecify the various ſubſequent writers who have availed themſelves of the *Touchſtone*, by making liberal extracts therefrom, tho' they have not had the gratitude to acknowledge the ſource of their information. Thoſe who will take the pains to compare any of the chapters in this work, with later treatiſes on the ſame ſubjects, will find the truth of this obſervation, which is intended rather to mark the authority of this book, than to depreciate that of others.—On a thorough examination, it is preſumed this work will be found to contain as excellent a *Theory of Conveyancing* as any extant; it is therefore now printed on the ſame ſized paper with *Horſeman's* Precedents, in order that ſuch gentlemen in that particular branch, who incline to the opinion juſt mentioned, may, by adding this volume to thoſe precedents, form a compleat body of conveyancing.—The univerſal eſteem in which the *Touchſtone* has been held, not only by conveyancers, but by the profeſſion in general, principally induced the editor to reprint it.—The humble merit of an editor is chiefly confined to correctneſs; in endeavouring to attain which, he found it neceſſary after the third chapter to alter the old orthography, by omitting the "e" final, which in the former editions was ſometimes inſerted and ſometimes omitted in the ſame word, even where it happened to be repeated in the ſame period.—The public will not require an apology for being preſented with what has been long wanted, a new edition of ſo valuable and excellent a work: but an apology is due from the editor for ſubmitting to the inſpection of the learned, tho' not without the approbation of ſome friends, the few notes which he has ventured to ſubjoin, and which originally were intended for his private uſe.—He aſſumes to himſelf no merit from this addition; but as the law, and particularly this branch of it, has received many material alterations and improvements ſince the laſt edition of this work, it is now become the duty of an editor to endeavour to point out the moſt important of ſuch changes: he is therefore led to hope, that the ſtudent, may find among the notes, ſome that are uſeful.—It has been his chief aim to make them clear and conciſe, and to render them ſerviceable by referring to the general books on the ſubject, and occaſionally to caſes and ſtatutes.—He does not pretend to have compared the numerous references of the original, tho' there are ſome which he has occaſionally rectified; but he has endeavoured to be peculiarly attentive to the correctneſs of thoſe he has added.——Tho' no pains or attention have been ſpared to render this edition as correct and uſeful as poſſible, yet the editor is convinced from the conſciouſneſs of his own inability, and the extenſive variety of matter comprehended in this work, how much he ſtands in need of the utmoſt candour of the public.

Lincoln's Inn,
12th *Jan.* 1780.

EDWARD HILLIARD.

(DEDICATION TO THE FORMER EDITIONS.)

TO THE RIGHT

WORSHIPFUL

THE

BENCHERS of the MIDDLE-TEMPLE,

AND

To the Reſt of the GENTLEMEN

OF THAT

SOCIETY.

GENTLEMEN,

I May perhaps have been ſo long out of your ſight, that I may be alſo by this time out of your mind. Nevertheleſs, it is not out of my mind, that I having received the ſeed and growth of that little knowledge in the laws of this kingdom which God hath given me in the ſeed-plot of your ancient and honourable SOCIETY, do no leſs (by a natural equity) owe the fruit thereof to you, than the rivers do their tribute to the ocean, and the trees their fruit to the planters and pruners. This therefore (ſuch as it is) although unworthy of ſo great a name, I am bold to dedicate to you, and put forth under the ſhelter of your favourable wings; beſeeching you to accept thereof, and my well meaning therein, and to honor it with your patronage and countenance, and it will much oblige,

Gentlemen,

Your moſt humble Servant

W. S.

TO THE KING'S MOST EXCELLENT MAJESTY.

THE PREFACE

(DEDICATION to the FORMER EDITIONS)

PREFACE

TO THE FORMER EDITIONS.

To the READER.

COURTEOUS Reader, I do desire in all plainness to be understood, that having, in the time of my study of the LAWS of this Realm, collected some confused NOTES and OBSERVATIONS out of the same: and being afterwards willing (for God knows I had no further end or aim at first in them) for mine own private help and better readiness, to digest them into some order and method, such as my understanding could best contrive. The which things, thus prepared and lying by me, came by chance to the view of some more learned than myself, who seemed to give some good approbation thereunto. Whereupon I first of all began to bethink myself of making some part thereof public. And having to that purpose advised with some of my more judicious friends, and being encouraged by some, and not discouraged by others, I did at last resolve to attempt to publish and put in print the same. And calling to mind that the COMMON ASSURANCES and CONVEYANCES of the Kingdom (whereupon the whole estates, and consequently the livelihoods, of very many depend) are matters of great importance, and that concern most men; and that therefore the legal learning thereof must needs be of great and daily use. And considering withall the mischief arising every where by the rash adventures of sundry ignorant men that meddle so much in these weighty matters, there being now

almoſt in every pariſh an unlearned, and yet confident, pragmatical attorney, (not that I think them all to be ſuch,) or a lawleſs ſcrivener, that may perhaps have ſome law books in their houſes, but never read more law than is on the backſide of *Littleton*, or an ignorant vicar, or it may be a blackſmith, carpenter, or weaver, that have no more books of law in their houſes, than they have law in their heads, and yet as apt and able (if you will believe themſelves) either to judge of a conveyance, and by the rules of law (of all which they are utterly ignorant) to determine of the ſtrength and goodneſs of a title or eſtate already made, or to make a conveyance to transfer the property of things from man to man, as the moſt learned and beſt counſellor of them all; and therefore undertake with great confidence, and diſpatch without any ſcruple, any buſineſs whatſoever offered to their hands: wherein they deal with men in their eſtates, as many that are called phyſicians (but in truth empiricks) deal with men in their bodies, (an evil fit for the conſideration of parliament). How they come to this their ſuppoſed dexterity and ſkill is a wonder, except that ſaying be falſe, *Nemo naſcitur artifex*. Either it muſt be born with them, or they muſt have it by education, or they muſt not have it at all. But if they will tell me they have good precedents, I will tell them that a good conveyancer muſt be as well able to judge of the validity of the title, and primitive eſtate of him that is to convey, (which a man can never do without knowledge of the rules of law, no more than a blind man can judge of colours,) as to make a derivative eſtate and conveyance by a good precedent; for *ſcire eſt per cauſas ſcire*, as the philoſopher ſpeaks. And as well, for ought I know, may a man be an able phyſician by certain medicines only, that never read ſo much as the grounds of phyſic, as ſuch men be able conveyancers by their precedents only, that never read ſo much as the maxims of law: *Nullum medicamentum idem eſt in omnibus*. For my part I muſt ingenuouſly profeſs that I can ſcarce look into a title or meddle with a conveyance of weight, wherein I cannot make and move more doubts and queſtions, than I am able to reſolve and anſwer; and therefore theſe men have gotten the ſtart of me much. And yet much marvel it is to ſee how theſe empiricks of the law (if I may ſo call them) are ſought unto and made uſe of, and that not only in leſſer, but oft-times in greater and more weighty buſineſſes, and that without the aſſiſtance of any others more able and ſufficient; the which

which is not for lack of opportunity of finding more learned men in the law, for there is a ſufficient ſtore of them in all places: nor do thoſe that employ theſe empiricks of the law, always ſave (if they think it ſaved) money hereby; for, beſides the great miſchief which is oft-times done themſelves by the unſkilfulneſs of theſe workmen, ſome of them by reaſon of their much cuſtom are grown more chargeable than an ordinary Counſellor, whoſe fee is certain and known. But of theſe empiricks of the law and thoſe that make uſe of them, I might ſay as ſometime our bleſſed Saviour ſaid, *Let them alone, the blind leaders of the blind.* Howbeit being now called (as I conceive) hereunto, I chuſe rather to admoniſh them and to tell the firſt ſort, that I conceive them to be uſurpers upon, and intruders into, other men's callings, and that they thruſt their ſickles into other men's harveſt, and that they have not yet learned that rule of divinity, *To abide in the calling wherein they are called,* but exerciſe themſelves in things too high for them; nor yet have they learned this, *Ne ſutor ultra crepidam,* let not the cobler go beyond his laſt; nor have they learned that, *In quo quiſque norit in hoc ſe exerceat;* and let me tell the latter ſort, that they heed not enough this ſaying, *Caveat Emptor*; nor believe that ſaying, *Cuique in arte ſua credendum,* that every man is to be believed in his own art. But if you will ſay to me, that theſe men do their work well, and their work doth ſucceed well; I will ſay to you, that the blind may happily hit the mark; and it may fall out that ſometimes they do their work well, and it doth ſucceed well, but oft-times woeful experience ſheweth the contrary, and that many men have been much miſchieved every where by the ignorance of theſe men. Wherefore I wiſh both ſorts of them to doubt more and to be well adviſed in theſe affairs, as the law doth preſume every one will be; for therefore is it indeed that a will hath a more favourable interpretation than a deed, becauſe men's wills are oft-times made in haſte, and it is preſumed men take who they can to make them; but men for the making of their deeds are not put upon thoſe ſtraits, but they take advice of learned men therein. And the more to move men herein and to redreſs the evil before diſcovered, I have herein ſet forth, under certain general titles or common Places, the greateſt part of the judgments, ſtatutes, reſolutions, and caſes that do contain or concern the learning of the COMMON ASSURANCES of the Kingdom; ſo as I think I may truly ſay, under reformation, that there are few material things, as

touching

touching this ſubject, to be found any where diſperſed in the volumes of the law, but they are to be found ſomewhere herein; and that there ſhall not happen one caſe of a hundred, but a hundred to one the diligent reador may here find the caſe itſelf, or ſome caſe that by good inference may be applied to it. Not that I would have men now to reſt upon this help, and be leſs careful and more careleſs to take advice of the lawyer than heretofore, (for this is the diſeaſe I labour to cure,) for although it may be that hereby theſe matters are made in ſome meaſure conſpicuous, yet to ſay the very truth, beſides that the ſubject matter of law is ſomewhat tranſcendent, and too high for ordinary capacities, the manner of putting of caſes is ſo conciſe, the diſtinctions and differences of law are ſo many, that it is hard for any man, not well read in the laws in general, to judge or make uſe of any part of them in particular, and rightly and fully to apprehend and apply the things herein ſet forth: and therefore I dare not adviſe men to reſt altogether hereupon, nor can I forbear to tell them it is very dangerous ſo to do. But my aims and ends, being alſo the uſes and commodities I expect and look after from this work, are, firſt of all, that ſuch men, before ſpoken of, may ſee by the view of the infinite variety of caſes, points, and queſtions, as touching theſe matters, diſcovering alſo ſo many by-ways wherein men converſant therein may walk, how much there goes to making up of an able conveyancer, and that it is not ſo eaſy a matter to judge of a title, give advice upon a Conveyance, and make theſe Common Aſſurances, as men dream of, and that therefore men learn more to ſuſpect themſelves and others herein; and to theſe it may ſerve as a light in a dark place. Secondly, that by this the lawyer and ſtudent may in ſome meaſure readily find together what he deſires touching theſe matters; and to him it may ſerve for a table or remembrancer. And laſtly, that every man may be the better able by the help thereof to underſtand, open and put his own caſe to his lawyer, and to move more pertinent queſtions to him: and other uſes I would have no man to make of it. In the uſe of this work therefore I muſt give thee two advertiſements or caveats: Firſt, that if thou deſire to find any thing in particular therein contained, that thou read the whole chapter, or at leaſt the whole queſtion and diviſion of the chapter, wherein that thing is contained. And ſecondly, that thou doſt not confidently build and rely upon any thing therein alone without advice from the learned lawyer alſo, or at leaſt without a ſerious and

judicious

judicious perusal of the authorities and books themselves to which thou art therein referred: *Melius est petere fontes quam sectari rivulos.* Some other things there are also here inserted, as falling aptly under the title, albeit they be not altogether pertinent to the subject matter. And all these sweet flowers of the law, growing *sparsim* in the great fields of the volumes of the Common and Statute Laws, have I thus painfully gathered, bound up and commended to thy charitable censure: no doubt but, in my desire to grasp and take up so much, I have taken and bound up some grass withall, which I hope shall not offend. If so be that I find it have a fragrant smell with thee, I shall think I have recompense enough for my pains. But if any man think me too presumptuous to attempt this enterprise, let him know first, that there is nothing of mine in it but the method, (and that not mine neither altogether,) the matter thereof being nothing else but the judgments, resolutions and opinions of the Judges of the law in succeeding times: and then as I have not trusted myself, so they shall not trust me altogether in these things. For I do freely acknowledge mine own weakness and want of judgment, and that I am the unmeetest and unworthiest of all men to undertake such a work, not one of a thousand, but the meanest of ten thousand. And this I have done is a poor something sufficient only to give them that are more learned, occasion to do something more exactly in this kind. If any man dislike the publishing of it in the English tongue, and think perhaps it may make the law to be the more despised, and the practitioner of the law the less regarded and used, I do wonder at the dislike of such a man: for to me there appears no more reason why to keep the laws in an unknown language that they may be kept from the knowledge of the people, than papists have to keep the scriptures and their prayers in a language unknown to the people; these being the laws by which the people are to be governed, and the law being the best inheritance of the subject. The wisdom of the *Parliament* hath thought fit to commend all the statute laws to the people in English, and to appoint that the pleadings should be in English. And have we not many books of law in English already, as *Littleton's Tenures*, *Doctor & Student*, *Finche's* Law, Justice *Dodridge's* Treatises, *Coke* upon *Littleton*, the *Woman's Lawyer*, and many others? and are not these useful and profitable? and besides the greatest part of the proceedings in Chancery (the court of greatest employment within the Kingdom) are in English. And if it be meet any part of the law be in the native tongue, it should seem

it is meet this part ſhould be ſo, becauſe it concerneth ſo many men, and them alſo ſo much, that they may ſee and underſtand ſomewhat in their own evidences. And therefore as we have turned their deeds from Latin to Engliſh, ſo let us alſo turn ſome of the law touching theſe deeds out of French into Engliſh. *Bonum quo communius eo melius.* And I ſee no reaſon why in law more than in phyſick the diſcovery of the art ſhould make the art or artiſts the leſs regarded. But (under correction) I ſhould think that it will rather make them both the more eſteemed, as a jewel whoſe properties are known, and that it will make them the more, and other men we have before ſpoken of the leſs, to be uſed and employed in their affairs; for the more men know, the leſs they think they know, and the more they doubt; and nothing moves men to be ſo bold and confident in theſe matters as their ignorance, according to the proverb, *Who ſo bold as blind Bayard?* And for further anſwer to this, I wiſh men to ſee the preface of the Lord *Coke* upon *Littleton*. And if any man have any thing elſe to object and except, (for ſome there are that will neither put forth their own ſtrength to do good, nor bear with others that do ſo,) I wiſh them to undertake the ſame ſubject, and to perfect and ſupply my defects. And ſo commiting thee to God, and this work to thy favourable cenſure,

I am thy true friend,

W. S.

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THE

THE

TOUCH-STONE

OF

COMMON ASSURANCES.

CHAP. I.

Of Common Assurances in generall.

THE common or generall assurances or conveyances of the kingdome (being that by which commonly the property of things is made or changed) are of two sorts, or are made two manner of waies, *viz.* either by matter of record, or by matter of deed. Those that are made by matter of record also are made either by matter of record of a more high nature and extraordinary way, or by matter of record of a more low nature and ordinary way. Those assurances that are made by matter of record of a more high nature, are such as are made by act of Parliament, of which we intend not to treat at all, neither doe we intend to meddle with those assurances, that are made by the King unto his subjects, as being matters more transcendant and intricate; but, those we intend to treat of are only the common assurances or conveyances that are made between subject and subject, and are of ordinary and daily use for the transferring of the property of lands, tenements and hereditaments from one man to another. And of these there are observed to be tenne kinds; two whereof are made by matter of record, as a fine, which is said to be a feoffment of record, and a common recovery, which is in the nature also of a feoffment of record: And the rest are by matter of deed; as first, by feoffment; secondly, by grant; thirdly, by bargain and sale, by deed indented and inrolled; fourthly, by lease; fifthly, by exchange; sixthly, by surrender; seventhly, by * release or confirmation, both which are in nature of grants; eighthly, by devise, or by last will and testament. And some of these also serve to transferre the property of other things, as well as of lands, and some of them also have other operations and uses, as well as to change and alter property, and passe things from one man to another, as will appear in their proper places. And the first thing we shall begin upon, shall be the learning of a fine and common recovery; and first, of a fine. * P. 2.

CHAP. II.

Of a Fine.

Fine, *quid.*

THIS word is ambiguouſly taken in our law; for ſometimes it is taken for a ſumme of money or mulct impoſed or laid upon an offender for ſome offence done, and then alſo it is called a ranſome. And ſometimes it is taken for an income, or a ſumme of money paid at the entrance of a tenant into his land: and ſometimes it is taken for a final agreement or conveyance upon record, for the ſettling and ſecuring of lands and tenements. And in this ſenſe it is taken here; and ſo it is defined by ſome to be, an acknowledgment in the King's court of the land or other thing to be his right, that doth complain: And by others, a covenant made between parties, and recorded by the juſtices. And by others, a friendly, reall, and finall agreement amongſt parties concerning any land or rent, or other thing whereof any ſuit or writ is hanging between them in any court. And by others, more fully, an inſtrument of record of an agreement concerning lands, tenements or hereditaments, duly made by the King's licence, and acknowledged by the parties to the ſame, upon a writ of covenant, writ of right, or ſuch like, before the Juſtices of the Common Pleas, or others thereunto authorized, and ingroſſed of record in the ſame court, to end all controverſies thereof, both between themſelves which be parties and privies to the ſame, and all ſtrangers not ſuing or claiming in due time (1). And in every fine there is a ſuit ſuppoſed, wherein the party that is to have the thing is called the plaintiffe, and ſometimes alſo in another reſpect the conuſee or recogniſee; and the other that doth depart with the thing, is called the deforceant (2); and ſometimes in another reſpect, the conuſor or recogniſor. And it is therefore ſaid to be, *finalis concordia, quia finem ponit negotio, adeò ut neutra pars litigantium ab eo de cætero poſſit recedere.* And it was anciently the end of a ſuit indeed; for after there had been ſome contention about the thing by ſuit, the parties became agreed who ſhould have it, and ſo a fine was levied of it, and there was an end of the matter; and hence it is ſaid to be, *fructus* or *effectus legis*, * becauſe it gives a man the fruit or effect of his ſuit. And to this day, therefore, a writ doth alwayes go forth before a fine can be levied; and this is now one of the common aſſurances of the kingdome (3).

Termes of the law, tit. Fine. Co. Lit. 126, 127, 120. Plow. 357. Weſt. Symb. par. 2. chap. 1.

Conuſee or recogniſee, conuſor or recogniſor. Deforceant.

* P. 3.

The parts of it.

There are five eſſential parts of a fine: Firſt, the original writ taken out againſt the conuſor, for without this a fine cannot be levied. Secondly, the King's licence for the levying of the fine, and for this the King is to have a fine or ſumme of money, which is called king's ſilver; for this is properly that money which is due to the King in the court of Common Pleas, in reſpect of a licence there granted to any man for paſſing a fine; and this is part of the revenues of the Crown (4).

Co. 5. 38. 43. Stat. 5 H. 4. ch. 14.

King's ſilver. *Quid.*

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(1) It is a *feoffment on record*, whereby a freehold may paſs by the common law, without any livery of ſeiſin. *Co. Lit.* 50, but ſee 3 *Atk.* 141. where Lord *Coke's* definition is conſidered; or it may (according to 2 *Blackſt. Comm.* 348.) with more accuracy be called, an *acknowledgment of a feoffment on record.*

(2) Why he is ſo called, *See* 3 *Blackſt. Comm.* 174.

(3) See further as to the nature of a fine. *Spel. Gloſſ.* 228. 1 *Wood* 531. *Wilſ.* 2.

(4) The quantum of the fines aſcertained, and the reaſon why they are payable to the King in 2 *Inſt.* 511.

Thirdly,

Thirdly, the conuſance or concord itſelf, which is the very agreement between the parties that intend the levying of the fine, how and in what manner the thing ſhall paſs, and doth begin thus: *Et eſt concordia talis, &c.* And this is the foundation or ſubſtance of the fine; for if upon this the King's ſilver be entred, albeit the conuſor die afterwards, yet the fine is good, and the note or foot of the fine are but abſtracts out of this (1). Fourthly, the note of the fine, which is an abſtract of the original contract or concord, and doth beginne thus: *Inter* A. *querentem* & B. & C. *deforcientes, &c.* Fifthly, the foot of the fine, which doth begin thus: *Hæc eſt finalis concordia, &c.* and containeth all the matter, the day, yeare, and place, and before what Juſtices it was levied, which is therefore called the foot of the fine, becauſe it is the laſt part of it, and when this is done, all is done. And of this there are indentures made by the Chirographer, and delivered to the party to whom the conuſance is made, which is called the ingroſſing of a fine, for then a fine is ſaid to be engroſſed, when the Chirographer makes the indentures of the fine, and doth deliver them to the party to whom the conuſance is made (2).

Concord. *Quid.*

Note of the fine. *Quid.*

Foot of the fine. *Quid.*

F.N.B. 147. a. Co. 5. 39.

Ingroſſing of the fine. *Quid.*

Weſt. Symb. part. 2. Seſt. 19. Dyer. 216. Plowd. 265. Stat. 4 H. 7. chap. 24. 1 R. 3. ch. 7. Co. 3. 86. Stat. 32 H. 8. chap. 36.

A fine is either without proclamations, which is alſo called a fine at the common law, and this is ſuch a fine as is levied after ſuch manner and form as fines were uſually levied before 4 *H.* 7. upon which no proclamations were made; which fine doth ſtill remain of the ſame force as it was at the common law to diſcontinue the eſtate of the cogniſor if it be executed. Or it is with proclamations, which is alſo called a fine according to the ſtatute, and which is ſuch a fine as is levied with proclamations after the form and manner ordained by the ſtatute of 4 *H.* 7. *c.* 24. (and ſuch a fine ſhall every fine that is pleaded be intended to be if it be not ſhewed what fine it is) and of this ſort were and are moſt fines ſince 4 *H.* 7. as being the beſt kind of fine of all; and it is in the election of him that ſueth out the fine as long as hee liveth to have it with, or without proclamations. A fine alſo whether with or without proclamations, is either executed which is ſuch a fine as of his owne force giveth a preſent poſſeſſion (or at the leaſt in law) unto the cogniſee, ſo * that he needeth no writ of *Habere facias ſeiſinam*, or other means for the execution thereof; but he may enter: of which ſort is a fine *ſur cogniſance de droit come ceo que il ad de ſon done*, which is in very deed the beſt and ſureſt kind of fine of all, and is thus, *et eſt concordia talis, ſcilicet quod prædict'* A. *recognoverit tenementa prædict' cum pertinen' eſſe jus ipſius* B. *ut ill' que idem* B. *habet de dono prædict'* A. *& ill' remiſit, &c.* And this kind of fine doth always ſuppoſe a feoffment, or gift precedent of the ſame thing whereof the fine is had, which the fine is to corroborate and ſtrengthen (3); or it is executory, which is ſuch a fine as of his own force doth not execute the poſſeſſion in the cogniſee, and of this ſort is a fine *ſur cogniſance de droit tantum*, when the

Quotuplex.

* P. 4.

Co. 7. 32.

(1) If the King's ſilver is not entered before the conuſor's death, the fine may be reverſed for error. 3 *Mod.* 140. but in 2 *Ld. Raym.* 850. where a fine is acknowledged before Commiſſioners *in the country, in the long vacation,* and before the next term the conuſor dies, tho' *no writ of covenant was ſued out, nor King's ſilver entered*; yet the Common Pleas will permit the conuſee to enter the fine as of the *Trinity* term preceding. See further, *Vin. Abr. Fine*, (F. b. 6.)

(2) As to the parts of a fine, ſee *Bac. Abr. Fine*, (A.) *Vin. Abr. Fine*, (M. b. 2.) *Com. Dig. Fine*, (E.) 1 *Co. Read.*

(3) And in reſpect of the heighth of this fine, a fee-ſimple may paſs without the word *heirs*. *Co. Lit.* 9. *b. Vin. Abr. Fine*, (N. b. 3.) *poſt.* 19.

party

party that doth levy the fine is ſeiſed of the thing, and he to whom the fine is levied hath no freehold therein but it paſſeth by the fine: (1) And a fine *ſur done, grant, releaſe, ou confirmation*, which is after this manner. *Et eſt concordia talis, ſc. quod prædict'* A. *conceſſit et reddidit tenementa prædicta cum pertin' præfat'* B. *et hæred' ſuis durante vita ipſius* A. *Et prædict'* A. *warrant' præd' cum pertin' præfat'* B. *& hæred' ſuis tota vita ipſius A.* Or thus, *Et eſt, &c. quod præd'* A. *conceſſit præd'* B. *tenementa, &c. Habend' eidem* B. *pro termino vitæ ſuæ.* Or thus, *Et eſt, &c. quod præd'* A. *recognoverit tenementa prædict' cum pertinen' eſſe jus ipſius* B. *& ille ei reddidit in eadem curia habend', &c.* Or a fine *ſur Done, ou Grant et Render.* Which is thus, *Et eſt concordia talis, ſc. quod prædict'* A. *recognoverit, &c. ut ill' quæ idem* B. *habet de dono prædict'* A. *et ill' remiſit, &c. Et pro hac prædict'* B. *conceſſit tenementa prædict' cum pertinen' præfat'* A. *Et ill' ei reddidit in eadem Curia habendum et tenend', &c.* And if theſe kind of fines be not levied, or ſuch render made unto them that be in poſſeſſion at the time of the fines levied, the cogniſees muſt enter or have writs of *Habere facias ſeiſinam*, according to their ſeverall caſes for the obtaining of their poſſeſſions. But if at the time of levying of ſuch an executory fine, the party unto whom the eſtate is limited be in poſſeſſion of the lands paſſed, he ſhall not need any writ of execution to put him in poſſeſſion, for then the fine will enure by way of extinguiſhment of right, and doth not alter the eſtate or poſſeſſion of the cogniſee, however perchance it doth better it (2). The fine *ſur conuſance de droit tantum*, alſo doth ſerve ſometimes to make a ſurrender, and then it is therein recited, that the conuſor hath an eſtate for life, and the conuſee the reverſion: and ſometimes it doth ſerve to grant a reverſion, (3) and then the particular eſtate is recited to be in another, and that the conuſor willeth that the other ſhall have the reverſion, or that the land ſhall remain to the other, after the particular eſtate ſpent: a fine alſo is either ſingle, which is ſuch a fine by which an eſtate is granted to the cogniſee and nothing granted or rendred back again to the cogniſor by the cogniſee. Or it is double, which is ſuch a fine as doth contain a grant, and render back again either of the land * itſelfe, or of ſome rent, common or other thing out of it to the cogniſor for ſome eſtate, limiting thereby many times remainders to ſtrangers which be not named in the writ of covenant, which alſo is ſometimes with reſervation of rent, clauſe of diſtreſſe, and grant of the ſame over (4).

Vide infra.

* P. 5.

4. The manner and order of levying of a fine.

The manner and order of ſuing out or levying of a fine is thus (5). Firſt, there is an original writ ſued out, and this may be a writ of *Meſne, Warrantia cartæ, de conſuetudinibus et ſervitiis*, or any writ of right, (for upon theſe or any other writ whereby land is demanded or may be recovered, a fine may be levied); but the moſt uſual writ whereupon a fine is levied is a

Experientia. Stat de modo levandi Fines 18E. 1. Weſt, Sym. ut ſupra. 1 H. 7. 9. Broo. Fine 116.

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(1) And veſts in the conuſee before entry, *Co. Lit.* 266. *b.* This fine, being *ſur conuzans de droit*, alſo conveys a fee-ſimple, without the word *heirs*, 6 *Co. Read* 7.

(2) For the diſtinction between a fine executed and executory. See 2 *Co. Read.* 2 *Inſt.* 513.

(3) For of a reverſion there can be no feoffment or donation with livery ſuppoſed, as the poſſeſſion, during the particular eſtate, belongs to a third perſon. *Moor* 629.

(4) See further, as to the different kinds of fines. *Weſt. Symb. part* 2. §. 19. *Vin. Abr. Fine*, (N. b.)

(5) The curious reader will find the antient manner of levying a fine in *Glan. l.* 8. *c.* 2, 3.

writ of covenant. And whiles this writ is depending, for howſoever it be the common practice to take out a *Dedimus poteſtatem*, and have the conuſance of a fine before any originall writ be ſued forth, yet the originall writ is alwaies ſuppoſed in law to precede the *Dedimus poteſtatem*, and therefore doth and muſt evermore bear *Teſte* before it, or elſe it is erroneous (1). After the original writ ſued forth, there is a *Precipe*, which is the tituling of the writ whereupon the fine is levied, and the concord and agreement of the parties, both which are fariely written, (and that moſt commonly in parchment:) after this, the party or parties that is or are to knowledge and levy the fine is or are to come in perſon before him or them that have power to take the ſame connuſance; who are to take notice of the perſons, that if there be any woman that hath a huſband amongſt the conuſors in the fine, they doe examine her whether ſhe be willing and doe it freely without compulſion of her huſband (2). After this, all the parties that are to levy the fine are to declare themſelves before the Judges or Commiſſioners (having power to take the ſame conuſance) to be willing to paſſe their right in the lands according to the agreement, and to ſubſcribe their names or markes to the concord: and if it be taken by a ſpeciall *Dedimus poteſtatem*, it is to be returned and certified under the hands and ſeales of the Commiſſioners into the Court of Common Pleas, that it may be there recorded and finiſhed. And there the party conuſee is firſt to compound with the King for his licenſe, for which he is to pay the King's ſilver, and thereof he is to have an entry on the back of his writ of covenant, and then he is to have it inrolled by the *Cuſtos brevium*, and upon this roll the proclamations are to be indorſed, after this, it is to be brought to the Chirographer, who is firſt to make that note thereof that is called the note of the fine (3): and hereupon if it be a remainder, reverſion, rent or ſeigniorie whereof the fine is levyed, the writ of *Quid juris clamat*, *per quæ ſervitia*, *quem redditum reddit*, as the caſe requireth, muſt be ſued forth (4). And after this, the Chirographer is to enter the fine of record to ingroſſe it, and to make and to deliver the indentures thereof unto the conuſee (5), and if it be a fine with proclamations, it is * to be proclaimed openly in the Court of Common Pleas once every one of the four termes next after the ingroſſing of it, (and it was to be proclaimed within the county where the land did lye at every aſſiſes and ſeſſions the next year after the ingroſſing of it, but this it ſeems is not neceſſary now) and the next terme after the ingroſſing of it the contents thereof are to be recorded in a table (made for that purpoſe) to be ſet up in the Court of Common Pleas at *Weſtminſter* in an open place all the terme time; and ſo alſo at every aſſiſes, the fine may alſo be inrolled and exemplifyed.

* P. 6.

(1) Accordingly *Cro. Eliz.* 740. *Goburn* v. *Wright*; but it ſeems, if the writ of covenant and de. po. both bear date on the ſame day, it is not error, *Arundel* v. *Arundel*, *ibid.* 677. ——*Note*, in the ſeveral Editions of *Cro. Eliz.* the number of the pages from 457 to 472 is repeated.

(2) In what caſes a feme covert ſhall be examined, *See Vin. Abr. Fine*, (F. M.) and *Co. Lit.* 353. *a.* How ſhe ſhall be examined and when ſhe, ſhall be barred, tho' not examined, *Chet.* 52.

(3) Which muſt be inrolled in the proper office, according to the ſtatute of 5 *H.* 4. *c.* 14.

(4) By the conuſee againſt the tenant to compel him to attorn, but by the ſtat. of 4 & 5 *Ann. c.* 16. §. 9. fines are good, *without attornment*; and there is no occaſion for ſuing out thoſe writs. *Wilſ.* 44.

(5) Tho' it is uſual to complete the indentures of the fine immediately on its being levied, yet there may be many years between the levying and ingroſſing a fine. *Plow.* 366.

5. The nature, uſe, and fruit of a fine.

A fine is a record as of great antiquity (1), ſo of a high nature, great force, and much credit and eſteem; and it is now become and ſerves for a formall conveyance of land, and one of the common aſſurances of the kingdome, for by this means a man may convey his land to another in fee ſimple, fee taile, for life or years, with reſervation of rent alſo. It is therefore called a feoffment of record, for it doth countervaile a feoffment with livery of ſeiſin in the country, and it includeth all that the feoffment doth; and worketh further of his own nature, and it is indeed for many purpoſes the beſt and moſt excellent aſſurance of all others, for by the antient Common Law it was ſo high a barre, and of ſo great force, and of ſo ſtrong a nature in itſelf, that it did conclude and barre not onely ſuch as were parties and privies thereto and their heirs, but all others of full age, out of priſon, of good memory, and within the four ſeas the day of the fine levyed, if they did not make their claim within a year and a day (2). And it is ſtill of that force, albeit it be ſomewhat enfeebled by ſome ſtatutes, that either it paſſeth all the right and intereſt of the conuſor to the conuſee, or elſe it worketh by way of extinguiſhment and eſtoppell, and doth perpetually barre the conuſor and his heires of all preſent and future right and poſſibility of right or other collateral benefit to the thing whereof the fine is levyed. And if it be a fine with proclamations it doth in time become a perpetuall barre to all others alſo, that have right, except they doe take care to prevent the barre by their claim, action, or entry, within five years after the proclamations ended. And it barreth intailes peremptorily whether the heire do claim within five years or not, if he make his claim by him that levyed the fine.

Statute of Fines 18. E. 1. Co. 1. 3. Plow. 358. 365.

6. What ſhall be ſaid a good fine, or not: and how. 1. In reſpect of the perſons thereunto and their capacity. And by, or to whom a fine may be levied, and who may be conuſors or conuſees. And by what names.

* P. 7.

Any perſon male or female, body ſole, or corporate, that hath capacity to grant, or is able to be a grantor by a deed, may levy a fine and be a conuſor therein, but there are certain perſons prohibited by law, which the Judges or Commiſſioners that take the conuſance of fines ought not to admit or receive, and yet if they do admit them, and a fine be levyed by ſuch perſons, the fine is good and unavoidable, *Fieri non debet ſed factum valet:* and of this ſort are mad-men, lunatikes (3), villaines, Ideots, men that have the lethargy, doting old perſons that want diſcretion, drunken men, and men that are forced to * it by threatning, impriſonment or the like, alſo ſuch as are borne blind, deaf and dumb, but a man that becomes ſo accidentally may be received and ought not to be refuſed. Alſo perſons attainted of felony or treaſon ought not to be received to levy a fine, but ſuch perſons being admitted to levy a fine, the fine will be good againſt all perſons but the King and the Lord of whom their lands whereof the fine is levied, are held for their times (4): but perſons waived or outlawed in perſonall actions onely ought not to be refuſed. [a] Alſo infants ought not to be received to levy a fine, and yet if an infant be admitted to levy a fine, and he do not avoid by writ of error during his minority (as he may if it be not a fine *Sur grant & render* in tail or for life)

Weſt. Symb. in his Tract of Fines. 17 E. 3. 5. 17 Aſſ. pl. 17 Litt. Sect. 731. Perk. Sect. 24. Fitz. Fines 120. See in Grant infra chap. 12 Numb. 4.

Perſons attaint.

Non ſanæ memoriæ.

Infants.

[a] 17 E. 3. 52. Cromp. Jur. 37. 10 E. 4. 13.

(1) Fines at the common law were frequent before the acceſſion of *Will.* the 1ſt. 2 *Inſt.* 511. *Vin. Abr. Fine* (A. 1, 2.)

(2) And the ſtat. of 18 *Ed.* 1. ſays, that on theſe accounts ſuch ſolemnity is required in paſſing a fine. 2 *Inſt.* 513.

(3) This is true ſtrictly at law; but where a man conveyed lands by deeds, fines and recoveries, under value, and by an inquiſition was found to be a lunatic, the purchaſe was ſet aſide, and the purchaſer only allowed the money he had actually paid. 2 *Vern.* 678.

(4) See the caſe of *Stevens* v. *Winning*, 1 *Wilſ. Rep. pt.* 2. *p.* 219.

life) the fine will be good for ever againſt him and all others.

b Perk. Sect. 19. Dyer 220. & per Juſt. Bridgman's opinion in private.

[b] And if he die during his nonage, before he hath avoided it, it ſeems his heire can never avoid it, and yet upon this point the Judges of the Common Pleas have been divided on a ſolemn argument, and of this *Juſt. Dod. in 17 Jac.* made a Quere (1).

c 17 E. 3. 52. 30 E. 3. 5. 27 Aſſ. pl. 53. Perk. Sect. 19. 20. Co. 7. 8.

Women covert.

[c] Alſo women that have huſbands ought not to be admitted alone without their huſbands to levie fines, and yet if ſuch a woman alone levy a fine of her own land ſhe hath in fee ſimple, and her huſband do not avoid it (as he may if he will) by writ of error, entry or otherwiſe during her life, or after her death during his own life, if he be tenant by the curteſie, this is now a good fine and will bind her and her heires for ever, except ſhe be an infant at the time of the fine levied, and her huſband happen to die during her minority, for then in that caſe, if it be not a fine *Sur Grant & Render* to her in taile or for life, ſhe may avoid it during her minority, but if the coverture continue untill her full age, in that caſe ſhe cannot avoid it except her huſband joyn with her in it, but the huſband and wife ought to be received together to levy any fine of her land. If ſuch perſons as are civilly dead, as Fryars, Monks, and the like, be admitted to levy a fine, the fine is void. But ſuch civill bodies as have abſolute eſtate in their poſſeſſions, as Major and Commonalty, Dean and Chapter, Colleges, and other ſocieties corporate may levy fines of the lands they hold in common, even by the Common Law, and ſuch fines are good; but eccleſiaſtical perſons, as Biſhops, Deans, Maſters of Hoſpitals, Parſons, Vicars, Prebends, and ſuch like, are by divers ſtatutes reſtrained to levy fines of their ſpiritual inheritances (2).

Weſt. Symb. part. 2 Sect. 9 Plow. 538. 575. Co. 11. 78. 1. in Magdalen-Colleg. caſe.

Corporations.

3 H. 6. 42. 41 E. 3. 7. 50 E. 3. 9. 24 E. 3. 62.

Any perſon that hath capacity to take by grant, or may be a grantee by deed, may take by fine and be a conuſee therein, as any perſon male or female, of full age or under age, whether it be a *Feme Covert*, mad perſon, lunatike, ideot, any perſon in priſon, or beyond the ſea, alſo any perſon attainted of felony or treaſon, or outlawed in any perſonall action, a baſtard, clark convict, or alien, may be conuſee in a fine, and a fine levied to ſuch perſons is good. [d] Alſo corporations ſpirituall and temporall may be conuſees in fines, and fines * levied to them are good, but before the ingroſſing of ſuch fines there goeth alwayes a writ to the Juſtices of the Common Pleas, *Quod permittant finem illum levari.* But ſuch perſons as are civilly dead, as Fryers, Monks, and the like, cannot be conuſees in a fine, and therefore a fine levied to ſuch perſons is void.

* P. 8.

d 5 H. 7. 25. 19 H. 6. 25. Dyer 188.

Weſt. Symb. in his Tract. of Fines.

The names of cogniſors and cogniſees in fines muſt be certainly ſet down, and they muſt for the moſt part be deſcribed by their right names of baptiſme and ſurname, whether they

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(1) The Law makes a diſtinction with reſpect to an infant, between *matters of record, and matters in fait, the latter* he may avoid either before or after he comes of full age, but *the former* only during his minority, becauſe matters of record, as fines, *&c.* are judicial acts and taken by a Court, or a Judge, and therefore the nonage of the party to avoid the ſame ſhall be tried not by the country, but *by inſpection of the perſon of the infant by the Judge*, which cannot be done after his full age; but if on a writ of error, brought by the infant to reverſe the fine for his nonage, proof thereof is made before he comes of age, and he afterwards dies before the fine is reverſed, his heir may reverſe it, or if he comes of full age before the reverſal is complete, it may be reverſed after his full age, *Co. Lit.* 131. *a*, 380. *b*, *Cro. Jac.* 230. 2 *Inſt.* 483. What is to be tried by the Court upon inſpection; ſee *Bac. Abr. Trial*, (D) and for the manner of reverſing a fine for the nonage of the conuſor by inſpection, 3 *Bl. Comm.* 332.

(2) The Queen may levy fines: an Alien who hath purchaſed land cannot levy a fine if the Court perceives it, but if the fine is levied it is good and ſhall never be reverſed. *Denſh. R.* on fines, 13. See further who may levy fines, *Vin. Abr.* Fine, (D. 10.) *Brown* 14. *Bac. Abr.* Fines, (C.)

be

be King, Princes, Dukes, Marqueſſes, Earles, Viſcounts, Barons, Lords, or Knights, which be names of dignity, but ſome of theſe are ſometimes deſcribed without their ſurname, as *Georg' Comes Salop. Johannes Dux Lancaſtr.* or whether they be Eſquires or Gentlemen, which be names of worſhip and honour. But theſe additions of names of dignity and honour given to ſuch perſons or any others, as Biſhops and the like, are uſed in fines rather of curteſie then of neceſſity, for they are not needfull in fines. But in caſe where there be two of one name it is ſafe to make ſome addition by way of diſtinction, as *ſenior* and *junior* and the like.

If a woman, living her firſt huſband, take a ſecond huſband, and with him and by his name acknowledge a fine, it ſeems this is void becauſe of this miſtake, but if a woman with her right huſband, by a wrong Chriſtian name, levy a fine ſhe is concluded by it, and cannot avoid it during her life. [e] And yet if a fine be levied to a man and his wife by a wrong name, as to *A.* and *Sibill* his wife, when her name is *Iſabell*, this is holden to be void. [f] But if a fine be levied by a woman by the name of *Margery* when her name is *Margaret*, or by the name of *Agnes*, when her name is *Anne*, it ſeems this fine is a good fine. 7 H. 4. 22. e 21 Aſſ. pl. 11. f F. N. B. 97. a. Litt. Broo. Sect. 344.

2. In reſpect of the perſons before whom it is acknowledged, and the perſons and place before whom and where it is recorded. And what perſons may take conuſance of fines or record them. And where, and how, and the duty of ſuch perſons therein.

The perſons or Judges before whom a fine is to be levied are of two ſorts, for ſome are Judges onely at the time of the cogniſance, and certificate thereof, and others are Judges to whom the cogniſance is to be certified, and before whom it is to be recorded. The firſt ſort are ſuch as have power to take ſuch cogniſance, either *ex officio*, and by virtue of their offices, or by ſome commiſſion general or ſpeciall granted unto them by the King out of Chancery; [g] as all or any two of the Juſtices of the Common Pleas may in open Court take knowledge of fines and record them by virtue of their office (1). [h] Or the Chief Juſtice of that Court may by the prerogative of his place take cogniſance of fines in any place out of the Court, and certifie the ſame without any writ of *Dedimus poteſtatem* (2): [i] and ſo alſo as it ſeems may two of the Juſtices of that Court with the conſent of the reſt: or one of them with a Knight (but this is not uſual at this day.) [k] Alſo Juſtices of aſſiſe by the generall words of their patents may take and certifie cogniſances of fines without any ſpecial *Dedimus poteſtatem*, but at this day they doe not uſe to certifie them without a * ſpeciall writ of *Dedimus poteſtatem*. And fines have beenlevied before Juſtices errants. West Symb. ubi ſupra. g Stat. 15. E. 2. Stat. de Carlil. h Dyer 224. Cromp. Jur. i Stat. 15. E. 3. Broo. Fines 20. k Dyer 224. Broo. Fines 120.

* P. 9.

Dedimus poteſtatem, quid.

Alſo Cogniſances of fines are taken by a ſpeciall writ iſſuing out of the Chancery called a *Dedimus poteſtatem*, whereby commiſſion is given in divers caſes to a private man for the ſpeeding of ſome act appertaining to a Judge upon a ſurmiſe that the parties that are to doe the ſame are not able to travell, and by this writ upon ſuch a ſurmiſe, power may be given to any Serjeant at law alone, or to any Knight and Gentleman together to take the conuſance of ſuch perſons, and they may by virtue thereof take the ſame [l] either of all or ſome of the parties; [m] and that (as it ſeems) in any place accordingly (3): [n] But a Cromp. Jur. 92. F.N.B. 147. a b. 146. F. G. l Curia 39. & 40 El. 17. m Dyer 220. n H. 6. 21.

(1) By the ſtat. 18 *Ed.* I. *de modo levandi fines*, which directs fines to be levied in the Common Pleas, and *not elſewhere*.

(2) But the Chief Juſtice of *England* cannot, nor any other of the Juſtices, except the Chief Juſtice of the Common Pleas, who hath this ſpecial authority by cuſtom, and not by any ſtatute. 9 *Co. Read.*

(3) For the origin of the writ of *De. po.* See 2 *Inſt.* 512. its nature and operation, *Vin. Abr. Fine*, (M. b.) by the preſent practice it is ſufficient if one of the Commiſſioners be a Knight, or tho' neither of them be a Knight, if one of the Judges gives his *Allocatur* to the caption, by which means great abuſes are ſaid to happen in taking of fines, *Bac. Abr. Fines*, (D.)

Juſtice or other perſon being cogniſee in a fine may not take the cogniſance thereof himſelf. And all theſe that have power to take the conuſances of fines are to take great heed of whom they do take the ſame, and whom they doe admit to make ſuch conuſances before them, [o] And therefore they are to ſee that they know the parties that are to be cogniſors, that they ſuffer not one man to make a conuſance in another man's name, and that they do not take any conuſance from any perſon prohibited by law, for miſdemeanors by ſuch perſons herein are puniſhable in the Star-Chamber (1). [p] And if there be any woman that hath a huſband that doth joyn with her huſband in the conuſance, the Judges or Commiſſioners muſt take care they do examine her whether ſhe be willing, and doe part with her right in the land willingly or by compulſion of her huſband, for albeit ſhe be made to doe it by compulſion of her huſband, yet hath ſhe no way to relieve her ſelf when it is done. [q] And after the Commiſſioners have taken the ſame cogniſances by *Dedimus poteſtatem* they are to certifie the ſame truly, and the day and yeare when it was taken, [r] and not another time (for this may be a miſdemeanor puniſhable in Starre-Chamber) and to return the commiſſion into the Court of Common Pleas under their hands and ſeals within a year after the taking of the ſame conuſance, at the fartheſt. [s] And if they refuſe to return or certifie it, the party grieved may by a writ called *Cognitionibus admittendis* or a *Certiorari* compel that Commiſſioner that hath it in his cuſtody, or his executor or adminiſtrator if he be dead, to certifie it. [t] But if any of the cogniſors happen to die before it be certified, then it cannot be certified at all, for it cannot now be made a good fine. [u] And ſo alſo (as ſome hold) if the King die. [*] But if the King's ſilver be entered in paper or upon the back of the writ of covenant (as the uſe is) and the party die after this, in this caſe the fine may go on and will be a good fine notwithſtanding the death of the party.

Cognitionibus admittendis, quid.

And Judges for the recording of fines be the Juſtices of the Common Pleas onely, and therefore all cogniſances of fines muſt be certified thither, for in that court onely and not in any other of the Courts * of Record at Weſtminſter, or in other inferiour Courts, or ancient demeſne, are fines to be levied. [x] But by ſpeciall grant a fine may be levied in a baſe Court. [y] And by certain acts of Parliament fines may be and are levied in the county palatine of Cheſter, county palatine of Lancaſter, and county palatine of Dureſme, of lands lying within thoſe places (2). And if any perſons do take conuſance of fines, other than ſuch as before that have power, or any other perſons or Judges ſhall record fines, or they ſhall be levied in any other court or place than as before, ſuch fines are void (3).

* P. 10.

3. In reſpect of the thing whereof the fine is levied, and

A fine may be levied of all things whereof a *Præcipe quod reddat* lieth, and of all things which are inheritable and in *eſſe* at the time of the fine levied, whether the thing be ec-

o 34 H. 6. 19 Broo. Fines 11. Cromp. Jur. 32. 92.

p 42 E. 3. 7. 3 H. 6. 42. Perk. Sect. 613. Doct. and St. 155. Cromp. Jur. 55.

q Stat. 23. El. chap. 3. Dyer 320.

r Dyer 220. Cromp. Jur. 92.

s Regiſt. or. 68 F. N. B. 147. b.

t Dyer 246.

u 1 H. 7. 9. Broo. Fines 124.

* Dyer 220. Stat. 15. E. 2. 44. 44 E. 3. 38.

x 50. Aſſ. pl. 9.

y Stat. 2. E. 6. chap. 28. 37 H. 8. c. 19. 5 Eliz. c. 27.

Stat. 32. H. 8. c. 7. Weſt. Symb. in his Tract of Fines, Sect.

(1) Commiſſioners ordered to be proſecuted for taking a fine from an infant feme, tenant in tail, with her baron, and the fine vacated quoad the feme only. 3 *Lev.* 36. *Skinn. Rep.* 23.

(2) In the city of *Cheſter* by 43 *Eliz. c.* 15; in the county palatine of *Cheſter* by 2d. & 3d. *Ed.* vi. *c.* 28; of *Lancaſter* by 37 *H.* 8. *c.* 19; of *Durham* by 5th *Eliz. c.* 27; and in *Wales* by 34 and 35 *H.* 8. *c.* 26. §. 40.

(3) Lord *Coke* in his eighth reading on fines ſays, fine levied in *King's Bench* is not void, but *voidable by writ of error.*

of what things a fine may be levied or not, and by what names.

cleſiaſtical and made temporall, or temporall (1). As of an honor, manor, iſland, barony, caſtle, meſſuage, cottage, mill, toft, curtilage, dove-houſe, garden, orchard, land, meadow, paſture, wood, underwood, chappell, river, chauntry, corrody, office, fiſhing, warren, faire, rectory, mines, a view of franke-pledge, waife, eſtray, felons goods, deodands, hoſpitall, furzes, heath, moore, rent, common, advowſon, hundred, way, ferry, franchiſe, ſeigniorie, reverſion, toll, tallage, pickage, pontage, aquitaile, ſervices, portion of tithes, oblations, or the like (2). And therefore fines *De honore de S.* or *De manerio de S.* or *de caſtro,* or *de caſtello de S. cum pertinen'* are good. So fines *de uno meſuagio, uno cotagio, uno malendino,* without *aquatico* or *granatico* annexed are good. So fines *de uno tofto, uno curtilag. uno columbario, uno gardino, uno pomario, decem acris terræ, decem acris prati, decem acris paſturæ, decem acris boſci, decem acris ſubboſci, de balliva ſive officio baillivat' de D. de cuſtod. ſive officio cuſtod. de B. de cuſtod. parci & forreſtæ de D. officio ſeneſcalciæ de S. cum pertinen', decem acris brueræ, decem acris moræ, decem acris uncariæ, decem acris mariſci, decem acris alneti, decem acris ruſcariæ,* are good. Alſo fines may be *de viſ. fran' pleg. libertate & francheſiis, in D. wardis, maritagiis, eſchaet catall. felonum, waviat extrahur. de catall. fugitivorum, utlagat. attinct. de ferreis. mercat. wrecco maris,* Or' *de rectoria eccleſiæ parochialis de M.* or, *de decimis granorum, garbarum & fœni eidem rectoriæ ſpectan' &c.* Or, *cum omnibus decimis granorum, garbarum & fœni eidem rectoriæ ſpectan'.* Or, *de decimis garbarum, ad eccleſiam de M. qualitercunque ſpectan'.* or *de omnibus & omnimod' oblationibus, decimis granorum, garbarum, fœni, lanæ, lini, canabis, porcellorum, aucarum, agell.* or, *&c. & aliis emolumentis quibuſcunq; ſpectan' creſcent' ſive exiſten' cum pertinen' in D.* Alſo fines may be *de cilio ſalium plumbarum, aquæ ſalcæ puteo,* Or, *de theolonio, ſtallagio, picagio, pontagio, infra burgum de D.* Or, *de quodam corrodio unius panis, unius lagenæ cerviſiæ pro omnibus hominibus in D.* Or, *de chiminio, de piſcaria,* or *de libera warrenna,* or *de frankfold, de francheſia,* or *de nundinis de D. ſingulis annis ad feſta de M. ibidem tenend'* * *mercat' de D. quiet. ſive libero paſſagio ultra aquam de D.* Or, *de communia,* or *de paſtura pro omnibus animalibus,* or *pro omnibus averiis,* or *de paſtura pro decem ovibus,* or *pro decem bovibus, equis, vaccis, porcis, ſpadonibus, &c.* or *de communia paſturæ quod prædict' M. B. habet & habere ſolebat pro omnibus averiis ſuis in centum acris terræ ipſus I. A. in D.* or *de advocatione eccleſiæ de D.* or *de advocatione tertiæ partis eccleſiæ, &c.* or *de rectoria de D. advocat. præſentat.*

25. 50. ſee in expoſition of deeds infra'.

* P. 11.

(1) Or whereof a *Precipe quod faciat,* doth lie, as the writ of cuſtoms and ſervices; or a *precipe quod permittat,* as to have a common way, &c. or a *precipe quod teneat,* as the writ of covenant to levy a fine, and the like, 2 *Inſt.* 513.

(2) To theſe may be added *Shares in the new river water,* whereof fines are levied by the deſcription of ſo much land covered with water, and when a fine and recovery of theſe ſhares are neceſſary, in regard the new river runs through the ſeveral counties of *Hertford, Middleſex,* and *London,* there muſt be three ſeveral fines and recoveries, 2 *Pr. Wms.* 128. Where *money is agreed to be laid out in lands to be ſettled in tail,* a fine cannot be levied of the money, but *a decree of a Court of Equity can bind it as much as a fine alone could have bound the land if it had been bought and ſettled,* 1 *Pr. Wms.* 130. but where the eſtate tail is of ſuch a nature as would require a recovery, and the remainder-man has but a chance for the eſtate, as the tenant in tail may happen to die before the recovery ſuffered, or in a vacation when a recovery cannot be ſuffered, a court of Equity, whoſe buſineſs it is to aid the intent of a party, will not, in violation of ſuch intent, decree the payment of the money to the tenant in tail, but decree it to be laid out in a purchaſe of land to be ſettled according to the direction of the party, in order that the chance of the remainder-man may be preſerved, 1 *Pr. Wms.* 471, 485. this doctrine was fully diſcuſſed, and all the caſes relating to it, in the caſe of *Pultney* and the Earl of *Darlington,* heard before Lord Chancellor *Bathurſt,* and reheard before Lord Chancellor *Thurlow* in Michaelmas Term 1778. See further of what a fine may be levied *Vin. Abr. Fine* (B. a.)

præsentat. donat. libera dispositione, & jure patronatus ecclesiæ de D. or *de patronagio cum advocatione vicaria ecclesiæ de D. & capell. eidem rectoriæ annex'*, or *de tertia parte advocationis ecclesiæ, &c.* or, *de medietat' advocat' ecclesiæ*, or *de advocatione medietatis ecclesiæ*, or *de medietate*, or *de tertia parte messuagii, decem acris terræ*, or the like, and these fines are good. Also a fine may be *de homagio*, or *de feod' militis*, or *de uno feod' milit' in D.* or *de servitio unius paris calcarium deauratorum*, or *de servitio inveniendi hominem equitem* or *peditem ad eundum vel ad equitandum* with the cognisee *in exercitu Walliæ, &c.* or *de minera plumbi & cujuscunque generis metalli*, or *de proficuis officii*, or *de proficuo molendini*, or *de gurgite*, or *cursu aquæ current'. d loco vocat' H. infra & per terr' voc' K. ad molend. vocat. B.* or *de wera sive veda in D.* And fines of all these and such like things are good, but a fine that is levied of a thing not certain, as *de tenemento* or *de hereditamento*, or the like, is void (1).

21 E. 3. 44. 18 E. 4. 22. West. Symb ibid.

A fine may be of a rent-charge which had no being before, (2). or of a chief rent or other rent which had a being before, but not of annuity, and a rent will passe by the number of the things to be rendered, as *de decem librat. decem marcat. sex denar'* or *quinque solid'* or *uno obolario.* As *precipe A. quod reddat B. con. &c. de 4 librat' reddit. & red. dimid' unius libræ piperis, ac reddit. unius paris chirothecarum, sagittæ barbatæ, unius par' calceorum, unius vomeris, 1 lib. ceræ, 1 lib. piperis, 1 lib. cumini, 1 clavi gariophylli, 1 rosæ rubræ, 1 acus & fili, quarterii frumenti, unius quarterii hordei, 2 bracei caponum, 40 gallorum, 20 gallinarium, mille ovorum et aucarum.* An honor may passe by the name of a manor, or by his own proper name, as *de honore de Tickhill*, or *de manerio de Tickhill*: so other things may most of them passe by their own proper names, as *de castro vicecomitatus de S. insula de D. hundred. de D. burgo de D.*

19 E. 4. 9.

A manor may passe by his proper name without naming of the town or place, towns or places wherein it doth lie, as *de manerio de D. cum pertinen'.*

Other things may passe in fines by the same names they are granted in deeds, as *de scit. ambit' et precinct' nuper monasterii de D. Scit. manerii de D. grangia de D. parco de D. præbend' de D.*

26 Ass. p. 54. 2 E. 3. 36 1 E. 3. 4. 27 H. 6. 2.

A castle or hundred may be parcell of a manor and passe by the name of the manor whereof they be parcell, and one manor may be parcell of another manor, and passe by the name of that manor, or * a castle may passe by his own proper name, as *de castello de S. cum pertin'* so also may a hundred passe by his own name, as *de hundred. de S.* * P. 12.

West. ubi supra.

A view of franke-pledge and such like things may also passe by their own names, as *De visu franc' pleg' bonorum et cattallorum, waiviorum, felon' fugitivorum, utlagat. in exigend' positorum, felon' de se, deodand. thesaur' invent' ac extrahur' cum pertinen' in M.*

Plow. 169. 171.

By the name of a messuage may passe a house, a curtilage, a garden, an orchard, a dove-house, a shop, a mill as parcell of the same. The like of a cottage, a toft, a chamber, a

(1) Or at least voidable by writ of error, for the uncertainty of the words; the proper word to express a *tenement* in a fine, being *messuagium*, and thererore a fine levied *de uno messuagio*, will be good, *Brown* 23.

(2) Accordingly *Wood*'s *Inst.* 242. *sed contr. Densh. R.* on fines 14.

cellar,

cellar, &c. Yet theſe may paſſe by their own ſingle names alſo, as *de uno meſſuagio, uno curtilagio, &c.*

A chappell or an hoſpitall muſt be demanded in a fine, and may paſſe by the name of a meſſuage. 13 Aſſ. pl. 2.

A reverſion of land may paſſe by the name of a reverſion, or by the name of the land it ſelfe. 43 E. 3. B. 1.

A foldage may paſſe by the name of *De libertate unius faldagii et curſu ovium cum pertinen' in F.* or *de libero faldagio ovium cum pertinen' in F.* or *de libera falda.* Weſt. ubi ſupra.

Land, meadow, or paſture, wood and the like, may paſſe by a certain number of acres, or by the certain meaſure of the ſuperficiall quantity thereof, as *de bida, carucata, bovata, virgata, acra, roda, furlingo terræ*; houſe-boot, hay-boot, and plow-boot may paſſe by the name of eſtovers, as *de rationabili eſtoverio in boſcis, viz. in decem acris boſci ipſius A. in D.* And a fiſhing may paſſe by the name of *ſeparali piſcar' in aqua de S.* 16 Aſſ. 9. Weſt. Symb. ubi ſupra.

And high-wood and underwood may paſſe by the name of wood, as *de* 20 *acris boſci, &c.*

Parſonages, rectories, advowſons, vicarages, or tithes impropriate paſſe not by the names *de advocatione eccleſiæ* but *de rectoria eccleſiæ de S. cum pertinen'.* But when the fine is but of a preſentation to a church onely, it muſt be *de advocatione eccleſiæ de S.* and not *cum pertinen'*, and of all vicarages endowed the writ muſt be *de advocatione vicariæ eccleſiæ de S.* and not *cum pertinen'*, and where no vicarage is indowed, it muſt paſſe under theſe words, *de advocatione eccleſiæ de S. &c.* Weſt. Symb. ubi ſupra.

If part of an entire thing paſſe, it muſt paſſe by theſe words, *de medietate, tertia parte, quarta parte, &c.* as the Caſe is, as *de duabus partibus in tres partes dividend. 8. acr. terræ*, or *de medietate omnium decimarum, granorum et fæni de ter' vocat' le Blacklands cum pertinen. in H.* But if an entire thing as a manor or meſſuage be parted, as if the manor of *S.* be divided into two parts, (if the diviſion be ſo made that the manor of that part be not extinct) and a fine be to be levied of a part of it, it muſt paſſe by the name of the whole, as *de manerio de S.* So if a meſſuage and 23. acres be parted, the part divided ſhall paſſe by the name of one meſſuage and 10 acres of * land, and not by the name *de medietate unius meſſuagii & viginti acr' ter'.* And if things be otherwiſe named than as before, ſometimes the fine will thereby loſe his force in all and ſometimes in part. But if a thing be twice named in a writ of covenant, as a manor, and a hundred parcell of the ſame, this will not hurt the fines.

* P. 13.

The things that do paſſe by the fine muſt be named to lye in the ſhire, town, pariſh, or hamlet, where it doth lie, for a fine is good, albeit it name the lands to lie in a hamlet, or in a town decayed; but it is good to name the town wherein the hamlet is, and that with addition for diſtinction if there be divers towns of the ſame name in that county. And if a manor extend into divers towns as into *A. B.* and *C.* it is good to expreſſe all or none, as *de Manerio de S. in A. B.* and *C.* For if any of the towns be omitted, none of the manor in that town will paſſe, but if the fine be of the manor of *S. cum pertinen'* and ſay not where it lieth, this fine will carry the whole manor. And if there be divers manors of one name, as *South S.* and *North S.* or the like, it is ſafe to ſet down in the writ for the fine which manor is intended to be paſſed, howſoever the fine may be good of the manor intended to be paſſed without the diſtinction (1). Broo. Fines 44. 91. 9 E. 4. 6.

(1) See further by what names things will paſs in fines, *Vin. Abr. fines* (C. a.)

7 H. 6. 39. Plow. 163. Regiſt. 2.

The order of placing things in fines is, Firſt, to ſet down the moſt worthy things before things leſſe worthy, as a manor before a meſſuage, a caſtle before a manor, a houſe before land, arable land before meadow, meadow before paſture, &c. Secondly, to ſet down things generall before things ſpeciall; as land, being the *Genus* of meadow, paſture, wood, &c. before them; wood, being the *Genus* to wood-grounds, as *alnetum, ſalicetum*, before them. Thirdly, to ſet down entire things before parts of things, as *de manerio de S. & medietate manerii de B.* Fourthly, to ſet down particular things after this manner;—

ſuagium, tum, lendinum, umbare, dinum, ra, tum, tura, cus, ra
Meſ, Toſ, Mo, Col, Gar, Ter, Pra, Pas, Boſ, Brue, Mora,
ria, cus, tum, caria, ditus;
Junca, Mariſ, alne, ruſ, red, Sectare priora (1).

And yet if this order be not obſerved, but the things be otherwiſe placed in the writ, if it be ſuffered to paſſe, the fine will be good enough.

4. In reſpect of the eſtate of the parties thereunto.

Stat. 27 E. 1. ch. 1. 41 E. 3. 14. 44 E. 3. 36. 39 E. 3. 16. 17 E. 3. 62. 24 E. 3. 26.

If either the cogniſor or cogniſee, at the time of the fine levied, be ſeiſed of any eſtate of freehold in fee ſimple, fee taile, or for life, in poſſeſſion, reverſion, or remainder, whether the ſame be by right or wrong, the fine will be a good fine in this reſpect (2). And therefore if one that is ſeiſed of land in fee ſimple, or fee taile, generall or ſpeciall, levy a fine of this land to a ſtranger, this is a good fine. So if a ſtranger levy a fine to him of this land, this is a good fine. So alſo a fine, levyed by, or to, a tenant for life of the land he doth ſo * hold, is good in this reſpect: but he muſt take heed of a forfeiture in this caſe; for if tenant for life levy a fine *ſur cogniſance de droit come ceo, &c.* to a ſtranger, or levy a fine *ſur grant & releaſe* to a ſtranger, to hold to the cogniſee for a longer time than for the life of the tenant for life, howſoever in this caſe the fine be a good fine, yet this is a forfeiture of the eſtate of the tenant for life, whereof he in reverſion or remainder may take preſent advantage (3). And yet if ſuch a tenant for life levy a fine *ſur grant & releaſe*, to hold to the cogniſee for the life of the tenant for life; or grant his eſtate by ſuch a fine to him in reverſion or remainder; or by fine grant a rent out of the land for longer time than for his own life; in theſe caſes the fine is good, and there is no forfeiture of the eſtate of the tenant for life. So likewiſe if a fine be levied to a tenant for life by a ſtranger, who doth hereby acknowledge all his right to be in the tenant for life, and releaſe and quit claim to him and his heirs, and go no further, this is a good fine, and no forfeiture of the eſtate of the tenant for life; for his eſtate is not changed thereby, and it may enure to him in reverſion; but if the ſtranger ſay further in the fine *come ceo que il ad de ſon done*, this is a forfeiture.

* Page 14. Forfeiture.

1 H. 7. 22. Co. 2. 56. 9. 106.

(1) Theſe two Monkiſh rhyming verſes appear to be intended to aſſiſt the memory.

(2) See accordingly 3 *Co.* 90. A fine by ceſtui que truſt, upon a conſideration, will bar and transfer a *truſt eſtate*, as effectually as it will a legal eſtate, 1 *Chan Ca.* 49. and it is ſaid that ſuch a fine with proclamations, and five years nonclaim, will bar the remainder of a truſt eſtate, 1 *Vern.* 226.

(3) But he is not bound to do ſo, and therefore the law gives him five years after the death of the tenant for life, becauſe he has no reaſon to look untill the natural determination of the eſtate, *per Ld. Hardwicke*, 2 *Veſ.* 482. ſo alſo *Whaley* and *Tankard*, 2 *Lev.* 52.

But if neither the cogniſor nor cogniſee be ſeiſed of any eſtate of freehold in poſſeſſion or reverſion, of the lands whereof the fine is levied, at the time of the levying of the ſame, but have onely a leaſe for years, or not ſo much, the fine is void and of no force as to any ſtranger, howſoever it may be good between the parties by way of eſtoppell (1). And therefore if a leſſee for years, or a diſſeiſee, or one that hath right only to a remainder or reverſion, levy a fine to a ſtranger that hath nothing in the land, this fine is void, or at leaſt voydable as to and by any ſtranger thereunto; and he that hath cauſe may ſhew that the freehold eſtate and ſeiſin of the land was in another before and at the time of the fine levied; and that *Partes finis nihil habuerunt tempore levationis finis*; and by this avoid it. And yet a vouchee after he hath entered into the warranty may levy a fine unto the demandant, but not to a ſtranger. And a diſſeiſor may levy a fine to a ſtranger that hath nothing in the land, and this is a good fine; for he hath the fee ſimple by wrong in him. Alſo the iſſue in taile may be barred by way of eſtoppell, by a fine levied by anceſtor being tenant in tail; albeit neither conuſor nor conuſee have any eſtate of freehold in the land (2). * A joint-tenant, tenant in common or coparcenour, may levy a fine of his part to a ſtranger, and this will be a good fine. And ſo alſo, as it ſeems, may one coparcenour or tenant in common to another.

Co. 5. 123. 3. 88. 90. ſuper Lit. 251. 3 H. 7. 9. 5 H. 7. 41 3 H. 6. 21. 27 H. 8. 4.

Eſtoppell.

a 26 H 8. 9. Dyer 334. 69. Plow. 375. 238. E. 4. 13 11 Ed 4. 68.

One ſingle member of a corporation aggregate of many cannot levy a fine of the lands of the corporation; as a mayor, or the maſter of a college, cannot levy a fine without the communalty, or his fellows, &c. But ſuch perſons may levy fines of the lands they are ſolely ſeiſed of in their own right, as other men may do.

* P. 15. * Such as have eſtates of freehold in eccleſiaſticall lands in the right of their churches, houſes, &c. as Biſhops, Deans and Chapters, Prebendarys, Parſons and the like, may not levy a fine of ſuch lands; for if they do, it will not bind the ſucceſſor.

Co. 11. 78.

He that hath an eſtate of fee ſimple in lands in the right of his wife ought not to levy a fine thereof without her; and if he do, ſhe and her heires may avoid it after his death (3). Alſo he that hath an eſtate of lands given in taile by the King, or by the proviſion of the King, ought not to levy a fine of this land, for it is void as againſt the iſſue in taile and the King. Alſo he that hath an eſtate of lands that are prohibited to be ſold by Act of Parliament, ought not to levy a fine of ſuch land. Alſo ſhe that hath an eſtate of lands of her huſband, or of any of his anceſtors, aſſured to her for her jointure, dower, or in taile, by the means of her huſband or any of his anceſtors, may not levy a fine of this land, for if ſhe grant a greater eſtate than for her own life, this worketh a preſent forfeiture (4).

Stat. 32 H. 8. chap. 8. 12 E 4. 12. Co. 6. 55. Broo. Fines 121. Stat. 32 H. 8 ch. 36. Co. 5. 3. 4. Stat. 1 H. 7. ch. 20.

5. In reſpect of the concord and matters touching it; and what concord or agreement may be made by fine or not.

In the concords of fines ſome things are to be regarded in the manner and forme, and ſome things in the matter and ſubſtance. Firſt, when a fine is levyed to divers cogniſees, the right ſhall be limited to one of them (5). As if a fine be

Weſt. Sym. ubi ſupra. Sect. 30. Co. 5. 38.

(1) Accordingly 1ſt. *Burr.* 95. and in *Co. Lit.* 352. *a.* an eſtoppel is explained.

(2) For a fine may be levied of a *right in futuro*, or of *a poſſibility*, and will be ſufficient to bar the iſſue in tail, 10 *Co.* 50. *a.*

(3) But if ſhe ſuffers five years to paſs after the death of her huſband without entry or action, ſhe and her heirs are barred, *Dyer* 72. *b.*

(4) See further of what eſtate perſons may levy fines, *Vin. Abr.* Fine (D).

(5) For if a fine be levied to two perſons and their heirs, the court will refuſe it, 1 *Leon Rep.* 62.

levyed by *A.* to *B.* and *C.* it ſhall ſay, *Quod prædict' A. recognoverit tenementa prædict' eſſe jus ipſius B. ut ill' quæ iidem B. et C. habent, &c.* But the King's tenant may acknowledge the right to be in divers. Secondly, the eſtate ſhall be limited to his heirs onely to whom the right is limited, and not to the heirs of all the cogniſees, as thus, *Quod pradict' A. cognoverit ten' præd' &c. eſſe jus ipſius B. ut ill' quæ iidem B. & C. habent de dono prædict' A. & ill' remiſit & quiet' clam' de ſe & hæred' ſuis præſat' B. et C. et hæred' ipſius B. &c.* The releaſe and warranty muſt be from the heires of one of the cogniſors, where there be more than one; for in a fine from divers the fee is ſuppoſed to be in one onely, and therefore it muſt be thus; *Quod prædict' A. & B. cogn' &c. & ill' remis' &c. de ſe & hæred' ipſius A.* &c. *Et iidem A. et B. conceſſerunt pro ſe et hæred' ipſius A. quod ipſi war' tenementa &c. contra ſe et hæredes ipſius A. in perpetuum.* But if the fine be of lands in gavel kind *contra* (1). Fourthly, the concord need not to rehearſe all the ſpeciall names of the things contained in the writ, but it is ſufficient to ſay, *Tenementa prædicta*, as *quod prædict' A recognoverit tenementa prædicta, &c.* Fifthly, as a concord cannot be without an original writ, ſo it muſt purſue the originall writ, and cannot be of any foreign thing, *i. e.* ſuch a thing as is not contained in the writ, except it be conſequent thereunto; as when the writ is of land, there may be in the concord of a rent out of this land; but there may be more things in the *Precipe* than are named in the concord. A concord may be with an exception of ſome part; but this exception muſt alwaies be of ſuch things whereof the writ will lie and are mentioned therein; * muſt be certainly named, and muſt ſucceed the things out of which they be excepted, as *precipe A. B. quod teneat C. D. convenc' &c. de manerio de D. cum pertinen' in C. (except' uno meſſuagio, duabus acris terræ, et advocatione Eccleſiæ de C. &c.) Et eſt concordia, &c. quod præd' A. cogn' tenementa prædict' cum pertinen' (except. præexcept.)* And in all theſe and ſuch like caſes, as before, where the concord is not formall, the judges ought not to receive the fine nor ſuffer it to paſſe; but if they do, and the fine be finiſhed, it cannot afterwards be avoided by writ of error or otherwiſe for theſe faults (2). * P. 16.

See in Weſt Symb. divers examples. Perk. ſect. 629. Broo. Fines 108.

The concord and agreement may be made of an eſtate in fee ſimple, fee taile, for life, or for years; it may be alſo of divers remainders, and that to them that are no parties but ſtrangers to the fine. It may be alſo ſingle or double, with a render back again of ſome eſtate in the ſame land or ſome rent out of it; ſo as a concord may have in it a reſervation of rent, a clauſe of diſtreſſe, or *nomine penæ*, and a warranty. [b] And therefore if *A.* levy a fine to *B. ſur cogniſance de droit come ceo, &c.* And *B.* by the ſame concord do grant and render the land back again to *A.* for life without impeachment of waſte, the remainder to *C.* the wife of *A.* for her life, the remainder to *A.* and his heires, this is a good concord; and by this deviſe a jointure may be and is oftentimes made to a woman. And if a man would have a leaſe for life or years made of land by fine, the leſſee muſt by the concord acknowledge the lands to be the right of the leſſor (who is ſeiſed of the land) as that, &c.

b Bro. Fines 106, 118. Co. 6. 33. Plow. 435. Dyer 279. Co. 1. 76.

Jointure.

Leaſe.

(1) Accordingly a fine levied by three, with warranty for the heirs of them all, admitted by the court; becauſe the land was gavelkind, and the conuſors heirs by the cuſtom, *Robinſon* on *Gavelkind* 132.

(2) For various precedents of precipes and concords, ſee *Brown* 26. *Wilſ.* 101, to 239. *Mad. Form. Angl.* 217 to 237. and for the nature and antiquity of concords, ſee *Mad. Form. Angl.* Diſſert. p. 13.

And

And then the leſſor muſt grant and render the ſame land back again to the leſſee (the conuſor) in the fine for life, or for a certain number of years, as the agreement is, reſerving a rent with clauſe of diſtreſſe; and this is a good fine, and a common deviſe for this purpoſe. But if the leſſor be tenant in taile, it ſeems this fine will not bind the iſſue in taile (1). And yet if *A.* tenant in taile, and *N.* do by fine acknowledge the land to be the right of a ſtranger, *as that*, &c. and then the ſtranger that is cogniſee doth grant and render the land again to *N.* for life or years, with clauſe of diſtreſſe, &c. and then grant and render the reverſion to the tenant in taile, this is a good fine, and will barre the iſſue in taile alſo, and will likewiſe paſſe the rent and the reverſion to the tenant in taile. So if a ſtranger that hath nothing in the land levy a fine *ſur cogniſance de droit come ceo que il ad* &c. to him in remainder in taile depending upon an eſtate for life, and the cogniſee by the ſame fine render to the cogniſor for tenne years to begin at Michaelmas following and dyeth, and all the proclamations are made after his death, and the tenant for life dyeth after the time the leaſe is to begin; this is a good fine, and ſo a good leaſe to barre the iſſue in taile.

If *A. B.* and *C.* levy a fine to *D.* and *D.* render the land back again to *A.* for life, the remainder to *B.* in taile, the remainder to *C.* * in taile, and the remainder to a ſtranger in fee, this or any ſuch like concord as this is good (2). And if *A.* and *B.* joyne in a fine of a meſſuage to *C.* and *D.* and to the heires of *C.* who do grant and render a charge of 30*l.* out of the land to *A.* for his life, to begin after the death of *B.* to be paid at the feaſts of, &c. *Proviſo ſemper quod pred' conceſſio pred' annualis reddit'* 30l. *non aliqualit' ſe extendat ad onerand' perſonas dict'* C. & D. *ſed tantummodo ad onerand' dict' meſuag' tota vita ipſius A.* and then they grant and render the meſſuage to *A.* during the life of *H.* the remainder to *B.* in taile, the remainder to the right heires of *B.* this is a good fine. But in ſuch a fine *ſur grant & render*, theſe things muſt be heeded: 1. None may take the firſt eſtate by the concord, but the cogniſors or one of them. And therefore if *A.* acknowledge a fine to *B.* and *B.* render and grant the land to *A. habendum ſibi & E. uxori ejus* and the heires of their bodies; or if the huſband levy a fine of his wife's land, and the cogniſee grant and render the land to the huſband and wife, this is not a good concord. 2. The render of the rent muſt be to one of the parties to the fine, and not to a ſtranger. 3. A man cannot reſerve a leſſe eſtate to himſelf than a fee; and therefore if *A.* acknowledge a fine to *B.* and *B.* render to *A.* in taile, the remainder to himſelf for life, this remainder is void. So if *A.* by fine acknowledge lands to *B.* and *B.* grant and render the land to the conuſor in taile, the remainder to *B.* in taile, the remainder to *B.* in fee, the limitation of this eſtate in taile to *B.* is void, and he can never have execution of it. So if *A.* acknowledge the lands to *B.* and *B.* doth grant and render to *A.* for life. 4. The agreement muſt be poſſible and ſenſible, for if there be three conuſors in a fine, and the conuſee render to one of them for life or years a rent, and grant the reverſion to another of them for life or years

* P. 17.

Weſt. Sym. ubi ſupra. Co. 7. 38.

1] 24 Ed. 3. 27. Bro. Fines 108.

2] Co. 2. in the Lord Cromwel's caſe.

3] 24 E. 3. 26. 14 H. 4. 31. Dyer 69. 33, 34.

4 Co. 6. 33.

(1) Unleſs executed in the life of the tenant in taile, ſee *Chet.* 8, and 27.

(2) The eſtate, made by the render, cannot be made to a ſtranger to the fine in the firſt inſtance; but if it be made to a party to the fine in the firſt inſtance, is may be afterwards limited to a ſtranger by way of remainder, 2 *Inſt.* 514.

rendering

rendring a rent, and grant the reverſion in fee or in taile to the third, this is not a good concord. 5. There can be no condition or clauſe of re-entry for not payment of rent inſerted into the concord, and yet ſome hold a fine levied to one in taile upon a condition with a remainder over is good. (*) And ſuch concords as theſe of the laſt ſort before ought not to be received, and if they be received, the fine in moſt caſes may be avoyded for theſe faults, but if a fine be received with a condition inſerted into the concord, this is a good fine and not avoidable by writ of error or otherwiſe.

5] 44 Ed. 3. 22. 27 H. 8. 24.

* Co. 3. 5. ſuper Lit. 353. 5. 38.

Plow. 248. No ſingle fine can be with a remainder over to any other perſon contained in it, but it muſt be to the conuſee and his heires only. 2. No rent can be reſerved upon a fine that is *ſur conuſance de droit come ceo, &c.* but upon a fine *ſur grant & render*, or *ſur conceſſit* only, for if one levy a fine *ſur conuſance, &c.* rendring rent, this reſervation is void. 3. No ſingle or double fine ſhall be received with any covenants or other agreements than are before mentioned, * but in all theſe caſes alſo when the fine is received and levied it ſeems it is good and unavoidable, and that only the remainder in the firſt caſe, the rent in the ſecond, and the covenants in the laſt, are void, and the fine good for the reſidue.

2] 50 E. 3. 9.

3] Co. 5. 38.

* P. 18.

44 Ed. 3. 36. A particular tenant, as for life, &c. cannot ſurrender his terme to him in reverſion or remainder by fine, but he may grant and releaſe it to him by fine.

44 Ed. 3. 45. One may grant his tenements which *H.* doth hold for life, and which after the death of *H.* ought to remain to him, to *H.* for life, rendering rent with clauſe of diſtreſſe, ſaving the reverſion, and a fine of this form is good.

44 Ed. 3. 11. 45 Ed. 3. 12. The manors and tenements contained in the writ may be divided, as if a fine be levied between *A.* and *B.* of two manors, and *B.* doth acknowledge all his right of the ſaid two manors to be the right of the ſaid *A.* as that which, &c. for which *A.* doth grant and render one manor to *B.* for life, with two parts of the other manor which *N.* holdeth in dower, to have the one manor and two parts of the other manor to *B.* for life, the remainder after his death to *A.* in taile, and that after the death of *N.* the third part ſhall remain to another. So if a fine be levied of the manor of *G.* with the appurtenances by *A.* unto *C.* which *A.* acknowledgeth the right in *C.* as that, &c. and *C.* granteth and rendreth the ſame to *A.* in taile, the remainder of the fourth part of the manor towards the weſt to the ſaid *A.* and her heires, the remainder of another fourth part towards the eaſt to *I* in fee, and ſo of the other two fourth parts; or uncertainly by 3. third parts in remainder to *A. B.* and *C.* in remainder ſeverally, and theſe are good concords.

44 Aſſ. Plo. 11 Bro. Fines 111.

Co. 5. 38. If *T.* and *E.* his wife levy a fine to *R. D.* and *T. C.* of divers manors and lands in *A. B.* and *C.* and in the fine there are divers grants and renders, and one grant and render is of the manors of *A.* and *B.* and the lands therein to *T.* and *E.* and the heires of *T.* and in another render 100. acres parcell of one of the ſame manors is granted to *E.* in taile, the remainder to the right heires of a ſtranger, notwithſtanding this ſeeming repugnancy, the record and conſequently the whole fine is good.

See before. The fine muſt be levied and ſued forth in that manner and order as before is ſet forth, for if it be not ſo, but that there want an originall writ, or if there be one, it doth beare *Teſte* after the *Dedimus Poteſtatem*, or the like, it will be a defective

6. In reſpect of the manner and order of levying it, and other matters.

fine, and either *ipſo facto* void, or at leaſt voidable by writ of error (1).

If any one of the conuſors die before the conuſance be certified after it is acknowledged and taken, the fine cannot now be made a good fine, and yet if the Commiſſioners ſhall certifie this conuſance with an antedate, and ſo the fine be finiſhed, this may be a good fine at the common law, but perhaps may be avoided by ſentence in * the Starre-chamber. But if the conuſance be certified and the King's ſilver paid to the King before the death of the conuſor, the fine may be ingroſſed and finiſhed after his death well enough, and it will be a good fine (2). And if a feme ſole make a conuſance of a fine, and before it be certified and ingroſſed ſhe take a huſband, this will not let but the fine may be finiſhed, and albeit it be recorded and ſued out in her name as ſole, whereas in truth ſhe is covert and of another name, yet is the fine a good fine, however in this caſe it is not amiſſe to get a releaſe of errors from her huſband.

Dyer 200. 254. Crem. Jur. 92. Dyer 246.

* P. 19.

Lands that are bought of divers perſons may paſſe by one fine and then the writ of covenant muſt be brought by all the vendees againſt all the vendors, and they muſt every one of them warrant for himſelf and his heires, and ſuch a fine is good (3).

Weſt. Sym. ubi ſupra.

If lands lye in divers ſhires, it may be contained in one concord, and good enough, but there muſt be ſeverall writs of covenant in every county, elſe the fine will not be good.

Dyer 227. 15 Ed 4. 33.

Covin. Recovery.

If a fine be levied of covin by a leſſee for years, or life, or a copiholder of purpoſe, and with an intent to barre him in reverſion or the Lord of his inheritance, this is of no force, and therefore *non-claim* within five years will not hurt in this caſe; So that it ſeems a fine or recovery may be covinous and avoidable for covin as well as a deed, and therefore that a fine or recovery levied or ſuffered of fraud to deceive purchaſors or creditors will be void as to them as well as any other conveyance.

Co. 3. 78, 8. 9. 105. Co. 3. 80. 16 H. 7. 5. ſee infra in Deed. Nu.

Uſury.

So alſo a fine or recovery levied or ſuffered in execution or purſuit of an uſurious contract may be void by the ſtatutes of uſury as well as a feoffment or other conveyance by deed. But a

Dureſſe.

fine or recovery ſhall not be ſaid to be levied or ſuffered *per dureſſe*, and avoided for that cauſe.

7. How the concord of a fine ſhall be expounded and taken.

The conuſance of a fine, and a grant and render therein ſhall be expounded and taken as a charter or other conveyance between party and party, becauſe it is a conveyance upon record, and not as a writ or judgment upon record (4). And therefore if *A.* and *B.* by fine acknowledge the manors of *S.* *T.* and *W.* to be the right of *C.* and *C.* doth render the manors of *S.* and *T.* to *A.* by one render, and after by another render limit 100 acres, parcell of the manor of *S.* to *B.* this ſhall be a good concord, and be expounded according to the intent of the parties, *viz.* That *B.* ſhall have the 100 acres, and *A.* all the reſidue of the manor.

Co. 5. 38. See in expoſition of Deeds infra.

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(1) If there is no original writ ſued out, the fine is not void but voidable only by writ of error, *Vin. Abr. Fine* (F. 2.) *Plow.* 394.

(2) The conuſor died before the return of the writ of covenant, and the fine ſet aſide after it was compleated, becauſe the poſt fine or King's ſilver *due at the return of the writ of covenant, and not before*, became due, and was paid after the death of the conuſor, *Watts* v. *Birkett*, 1 *Wilſ. Rep. pt.* 2. *p.* 115. See *Ante*, *p.* 3. Note 1.

(3) And ſuch *joint fines* ſeem reaſonable, where the ſeveral purchaſes are of ſmall value, though they are *ex gratia*, ſee *Wilſ.* 47. where an order of Lord Chancellor *Hatton* is inſerted, authorizing the Curſitor to ſtay the writ when there is more than one demandant and one deforciant, (except coparceners, joint tenants and tenants in common); but the Curſitor will permit two ſeparate purchaſes to be comprized in one fine, on an affidavit that the value of them together does not exceed 200*l.*

(4) The fine and render is a conveyance at common law, and the render makes the conuſor a new purchaſer as much as feoffment and re-infeoffment at common law, 1 *Salk.* 337.

If

37 H. 6. 5. If a fine be levied to two men & *hæredibus*, without the word [*Suis*] this is void for incertainty in a fine as it is in a deed. Deed.

Co. ſuper Lit. 9. Frederick verſ. Wakefields caſe. Trin. 36 Eli. Co. B. If a fine be levied, *come ceo que il ad de ſon done*, hereby a fee-ſimple will paſſe without any word of heires. And ſo alſo it is in caſe of a common recovery. Recovery.

If the lands be limited in the concord of a fine to *B.* for life, and after to the children of *C.* begotten, and *C.* hath at the time of the * fine levied two daughters onely, in this caſe the ſonnes and daughters that are born after ſhall take nothing by this fine. And no averment of intent will help in theſe caſes. And yet an averment lieth upon a fine of the uſes thereof and of no other matters as upon a deed. Averment.

* P. 20.

Stat. 18. Ed. 1. de finibus ſtat. 34. Ed. 3. 16. Plow. 373. ſtat. 4. H. 7. ch. 24. 1 R. 3. ch. 7. 32 H. 8. c. 36. A fine at the common law, or a fine without proclamations was once a perpetuall bar to all perſons that had right and no impediment at the time of the fine levied, and that did not claime within a yeare and a day after the execution of the fine by poſſeſſion; but now this law is changed, and this kind of fine will barre none but ſuch as are parties and privies thereunto (1). But a fine by the ſtatute, or a fine with proclamations is now much of the ſame virtue and force as a fine at the common law was, for by the ſtatute of 4 *H.* 7. it is provided, That every fine after the ingroſsing thereof ſhall be proclaimed in the court the ſame tearme, and the three next following tearmes, foure ſeverall days in every tearme (2), which proclamations ſo made, the fine ſhall conclude all parties, privies and ſtrangers, except women covert, perſons within 21 years of age, in priſon, out of the realme, or of *non ſanæ memoriæ*, (being no parties to the fine) ſo as they or their heires take their action or lawfull entrie within five yeares after theſe imperfections removed. Saving to all perſons and their heires (other than parties) the right claim and intereſt which they have at the time of the fine, ſo as they purſue it by action or entry within five yeares after the proclamations. And ſaving to all other perſons ſuch right, title, claime and intereſt, as firſt ſhall grow or come to them after the proclamations by force of any matter before the fine, ſo as they make their claime or entry within five yeares after the ſame grow due, or if at that time there be any impediment as aforeſaid, within five years after the impediment removed (3). And by the ſtatute of 32 *H.* 8. (which is an expoſition of this ſtatute) it is provided, That all fines with proclamations levied according to 4 *H.* 7. by any perſon of twenty-one years of age, of any land, &c. before the fine levied entailed to him that doth levy the fine or any of his anceſtors in poſſeſſion, reverſion, remainder, or uſe, immediately after proclamations had, ſhall be a bar againſt him and his heirs, claiming onely by force of any ſuch entail, and againſt all others claiming only to the uſe of him or any heire of his body (4). By which ſtatute it doth appear that all the 8. What perſons ſhall be barred by a fine, or a fine and Non-claime. And in what time. Or not, And how.

(1) The legal ſignification of the word *Bar* explained in *Co. Lit.* 372. *a*; and for the different methods of making *Claim* at common law and by whom ſuch claim ſhould be made, 2 *Inſt.* 518.

(2) But by the ſtatute of 31 *Eliz. c.* 2. a fine need only be proclaimed four times, *viz.* once in the term wherein it is ingroſſed, and once in each of the three ſucceeding times; ſee further as to proclamations, *Fiſh* v. *Broket*, *Plow.* 265.

(3) If the reader is deſirous of comparing the opinions of hiſtorians and lawyers concerning the ſtatute of fines 4 *H.* 7,—he will find them in 3 *Hume's Hiſt.* 8vo. *p.* 400, 2 *Mortimer's Hiſt.* 188. 4 *Bl. Comm.* 422, and in the 13th *Edit. Co. Lit.* 121 *a. Note* 1. which contains an explicit deſcription of the nature, uſe, and effect of a fine, by the learned and ingenious editor of that edition.

(4) Previous to the 32d *H.* 8. it was doubted whether a fine levied by tenant in tail could bar the iſſue under the ſtatute 4 *H.* 7. although all perſons appeared to be concluded thereby under the words *privies* and *ſtrangers* to the fine, and that doubt occaſioned the enacting the ſtatute 32 *H.* 8. See *Bac. Abr. Fines*, (E.)

parties to the fine, conuſors and conuſees, whether they be femes covert, men *de non ſanæ memoriæ*, or others, (infants onely excepted, who during minority may avoid it) and whether they have a naturall or civill capacity; and privies, *viz.* privies in bloud, as heirs, whether they be lineall or collaterall, or privies in repreſentation, as executors and adminiſtrators; and all ſtrangers alſo, *viz.* all others beſides parties and privies that have or pretend any preſent right * or title (except women covert, and the reſt that have impediment that doe make their entrie or claim, or bring their action within five years after proclamations had, and thoſe perſons excepted alſo if they make not their claim, &c. within five years after the impediment removed) all theſe are included. *i. e.* ſo ſhut and cloſed up together, for their right is ſo extinct hereby, as they can never open their mouthes or lift up a finger againſt it. Saving to all others, *i. e.* ſuch as have no preſent right at the time of the fine levied, and were excepted before ſuch right, title, claim or intereſt as ſhall accrew to them after the proclamations upon any truſt, gift in taile, or other cauſe, before the fine levied, ſo as they make their claim, &c. within five years after their right firſt accrewed if they have then no impediment, or if they have, within five years after the impediment removed (1).

* P. 21.

For a more full underſtanding of which ſtatutes and this matter, theſe things in generall muſt firſt be obſerved. 1. That the perſons, to be barred by a fine are, [1] parties. [2] privies. [3] eſtrangers. The parties, if they be of the age of twenty-one years, are bound for ever by the fine, and ſhall have no time to claim to preſerve their right. The privies alſo, being heirs and executors to the parties and void of impediment at the time of the fine levied, or not, if they claim by the ſame title that their anceſtor had that levied the fine, are barred for ever by the fine, and ſhall have no time to claim to preſerve their right (2). [a] And therefore if my father diſſeiſe my grandfather of land and then levy a fine of the land, and then my grandfather die, and after my father die, by this fine I am barred of the land for ever. And here note, [b] that he that is a privy within the intent of 4 *H.* 7. is an heir within the ſtatute of 32 *H.* 8. *Et ſic e converſo.* And that privies or heirs in eſtate and bloud, as he that is heir to whom the land doth or ſhould deſcend, are within theſe ſtatutes, and ſhall be barred by the fine of their anceſtor of that land. And ſo alſo ſhall privies in eſtate that are not privies in bloud, as where one hath land in Burrow Engliſh, and levie a fine of it, hereby the youngeſt ſonne is barred. So if one be tenant in taile to him and the heirs females of his body, and he levie a fine, having a ſonne and daughter, hereby the iſſue female is barred, and yet ſhe is not the heir of his bloud. But he that is privie in bloud onely, and not in eſtate alſo, is not within theſe ſtatutes, neither ſhall he be barred by the fine, and therefore if lands be given to a man, and the heirs females of his body, and he hath a ſonne and a daughter, and the ſon levie a fine and die without iſſue, this is no barre to the daughter, for howſoever ſhe be heire of his bloud, yet ſhe is not the heir to the eſtate, nor ſhall need to make her conveyance to it by him. The ſtrangers that are to be concluded by the fine, are either, 1. Such as have

[a] Dyer 3. Paſch. 7. Jac. B. R.

[b] Trin. 21. Jac. Com. B. Curia in Will. Godfrey's caſe.

(1) The ſtatutes relating to fines in order of time, the benefits intended by them, and the inconveniencies they were made to redreſs, with comments, ſee in *Chet.* 21 to 49.

(2) Who are deemed parties and privies, and how they ſhall be barred, ſee 2 *Inſt.* 516. *Vin. Abr. Fines* (A. 3. §. 8.)

preſent

preſent right and no impediment, and theſe are barred * if they make not their claim within five years after the proclamations (1). 2. Such as have preſent right, but have impediment of infancy, &c. and theſe are barred if they doe not make their claim within five years after the impediment removed. 3. Such as have no preſent but future right upon cauſe precedent, and they are either without impediment, and then they are barred if they claim not within five years after their right doth accrue; or they have impediments, and then they are barred if they claim not within five years after the impediment removed (2). 4. Such as have neither preſent nor future right at the time of the levying of the fine by reaſon of any matter before the fine, but whoſe right groweth either entirely after, or partly before, and partly after the fine, and theſe are not barred at all by the fine, but they may make their claim, &c. when they will. And parties, privies, and ſtrangers to fines that are barred thereby, are ſuch as have naturall capacities or civil, for both theſe are barred. And therefore it is held, if ſuch a corporation as hath an abſolute eſtate and authority of his poſſeſſions ſo as he may maintain a writ of right thereof, as Major and Communalty, Dean and Chapter, &c. levy a fine of their lands, they and their ſucceſſors are barred preſently; but if a Biſhop, Dean, or Prebend, without aſſent of the Dean and Chapter, or a Parſon and Vicar without aſſent of the Patron and Ordinary had levied a fine, this would not have barred the ſucceſſor; neither will it barre now with their aſſent, for they are reſtrained by divers ſtatutes (3). So alſo ſuch perſons are barred by the fines that are levied by others if they make not their claim in time, as if one diſſeiſe a corporation aggregate of land belonging to their corporation, and after levie a fine of it with proclamations, and they doe not make their claim, &c. within five years, hereby they are barred (4). 2. Where the anceſtor is barred by the fine, there for the moſt part the heire is barred alſo. And therefore if tenant in taile be diſſeiſed, and the diſſeiſor levie a fine with proclamations, and the tenant in taile ſuffer five years to paſſe without claim, &c. hereby he and his iſſues are barred for ever, ſo that the heire doth ſuffer for the lacheſs of his anceſtor. 3. The eſtates that ſhall be barred by the fine are eſtates by the common law, or by copyhold, in fee-ſimple, fee-taile, or for life, or for years, the eſtates alſo of tenant by ſtatute, elegit, and of gardeins in chivalrie and of executors that have land untill debts and legacies be paid. And therefore if one enter upon, and put out a copiholder of land, and levie a fine thereof, and the copiholder ſuffer five years to paſſe and make no claim, &c. the copyholder and his lord both are hereby

* P. 22.

Plow. 538. 337. 375. 378.

Co. 9. 105.

Co. 9. 104. 5. 124.

(1) Tho' the ſtatutes of 4 *H.* 7. and 32 *H.* 8. have made the operation of fines ſtronger againſt parties and privies than they were at common law, yet they have enlarged the privilege of ſtrangers to avoid them, for, by thoſe ſtatutes, ſtrangers have five years from the fine to make their claim where they have a preſent right at the time of the fine levied, and where it accrues after the fine, they have five years from the time of ſuch accruer; whereas by the common law in both theſe caſes they had only a year and a day from the entry of the ſilver at which time the land paſſed. *Bac. Abr. Fine* (F.)

(2) And by the 4 *Ann. c.* 16. §. 16. no claim or entry to avoid a fine with proclamations will be ſufficient, unleſs within one year after ſuch claim an action is commenced and proſecuted with effect.

(3) 1 *Eliz. c.* 19. 13 *Eliz. c.* 10. *ante, p.* 7.

(4) But not their ſucceſſors after their deceaſe, for it would have been of none effect to have prohibited corporations from barring the right of their ſucceſſors by conveyances made by themſelves, and to have left them power by their permiſſion or ſufferance and nonclaim to bar it, 11 *Co.* 78. b. And accordingly fine levied by copyholder of a dean and chapter, and five years paſſed without claim by him who was dean at the time, yet the fine did not bar the ſucceeding dean. *Ventr.* 311.

barred for ever (1). And if a leaſe be made for years, and the leſſor or another before entrie of the leſſee levie a fine with proclamations, and the leſſee doth not make his claim, &c. within five * yeares, hereby the leſſee is barred of his intereſt for ever. 4. The things whereunto theſe ſtatutes do extend, are lands and tenements, and not a rent or other profit apprender out of the land, and therefore if I have a rent, common, or eſtovers out of land or a way over land, or power to fell the land, and a fine is levied of the land itſelf; and I doe not make my claime of my rent, &c. within five years, yet I am not hereby barred of my rent, &c. And for this cauſe it is, that if a tenant in ancient demeſne levie a fine of his land, and five yeares paſſe, the lord is not hereby barred to avoid it, for herein he claimeth not the land but his ancient ſeigniorie (2). 5. The time in which they muſt make their claim, or bring their action that have preſent right and no impediment is within five years after proclamation had, and the time for them which have impediments is within five years after the impediment removed. 6. The time within which they muſt make their claim or bring their action whoſe right doth happen afterwards, if they have no impediment, is within five years after the time that their right doth accrew, and if there be any impediment within five years after the impediment removed. 7. The perſons whoſe right is ſaved and preſerved are mentioned in the firſt and ſecond ſaving of the ſtatute of 4 *H.* 7. and they are ſtrangers and not parties nor privies. 8. They that have benefit by the firſt ſaving of the ſtatute ſhall have none by the ſecond ſaving, for he that will be within the ſecond ſaving to have benefit by it muſt be, 1. Another perſon. 2. The right muſt come and accrew to him firſt. 3. It muſt come to him after the fine and proclamations. 4. His right muſt be upon ſome cauſe or matter before the fine. 9. No fine ſhall barre any eſtate in poſſeſſion, reverſion, or remainder, which is not deveſted and put to a right at the time of the fine levied (3). And therefore if one levie a fine of my land whiles I am in poſſeſſion of it, this fine will not hurt me. So if the tenant of the land, out of which I have a rent or common, &c. levie a fine of the land, this ſhall not barre me of my rent or common, for I am ſtill in poſſeſſion of this in the judgment of the law (4). So if there be tenant for life the remainder for life, or tenant in taile the remainder in taile, and the firſt tenant in taile, or for life, do bargain and ſell the land by deed indented and inrolled, and after levie a fine to the bargainee, in this caſe the remainders are not barred, albeit five years paſſe without claim, for the law in theſe caſes doth adjudge them always in poſſeſſion (5). So if I make a leaſe for years of land, rendring a rent, and a ſtranger levie a fine of the land, and the leſſee for years payeth his rent to me duly, in this caſe I am

* P. 23.

Plow. 378. Bro. Fines 123. Co. 5. 124.

Plow. Lord Zouche's caſe, 370.

Dyer 3. Co. 3. 86, 91. Plow. 373.

Co. 5. 124. 9. 106.

(1) And the lord ſhall not have five years after the death of the copyholder even if he was a copyholder for life. See 9 *Co.* 105. *b.* That copyholds are within the ſtatute of 4 *H.* 7. See *Co. Comp. Cop.* 126.

(2) See accordingly 1 *Salk.* 210. and further as to the force and effect of fines in ancient demeſne, *Vin. Abr. Fine* (*N.* b. 4.) 4 *Inſt.* 270.

(3) And he that at the time of the fine levied had not any title to enter ſhall not be barred, for the fine does not bar the eſtate but binds the right, and when the fine does not turn the eſtate to a right, there needs no claim. Sir *T. Raym.* 149. 3 *Mod.* 196. but this muſt be underſtood in the caſe of a future intereſt, and not of a tenant in tail barring his iſſue, by ſtat. 32 *H.* 8.

(4) See accordingly *Saffin* v. *Adams*, *Cro. Jac.* 60.

(5) The remainder not being diſplaced, for the bargainee had a fee determinable upon the entry of the iſſue, and he in remainder has his remainder open upon default of iſſue of the tenant in tail. 10 *Co.* 96.

ſaid

ſaid to be always in poſſeſſion, and therefore am not barred by this fine of my reverſion. So if there be a tenant by copy or leaſe for life, the remainder for life, and the firſt tenant for life accept of a fine of the * land with proclamations and five years paſſe without claime, &c. hereby he that is in remainder is not barred. So if one have a leaſe for years of land to beginne in *futuro* and a fine is levied of the land, and five years paſſe after the terme beginne, it ſeems this is no barre, becauſe this eſtate is not put to a right. And for the further illuſtration of all theſe things ſee the examples following. [c] If tenant in taile levy a fine of the land intailed with proclamations according to the ſtatutes, this is a barre to the eſtate taile, wherein theſe things are to be known. 1. That whereſoever the iſſue doth claim by the ſame title, and muſt make his conveyance to the lands by him that levied the fine, there the fine will barre him, and therefore if lands be given to the huſband and wife in ſpeciall taile, *viz.* to them and to the heirs of their two bodies iſſuing, or the like, or the gift be to them and the heires males or females of their two bodies, or to them and the heires of their bodies with the remainder to the right heires of the huſband in fee, and the huſband alone levieth a fine with proclamations, by this the iſſue in taile is barred. And yet the right of the wife is ſaved ſo as ſhe makes her claim, &c. within five years after her huſband's death (1). [d] So if huſband and wife tenants in ſpeciall taile have iſſue and the wife die, and the huſband marry another wife and have iſſue and levy a fine *ſur cogniſance de droit come ceo &c.* and take backe by the ſame fine an eſtate in ſpeciall taile the remainder over, &c. and die, the iſſue by the firſt wife is barred. [e] So if tenant in taile be diſſeiſed, or make a feoffment in fee, and after levie a fine with proclamations to the diſſeiſor or to a ſtranger, the iſſues in taile are hereby barred for ever, the continuance of the poſſeſſion in another notwithſtanding. [f] So if a gift be made to the eldeſt ſonne and the heires of his body, the remainder to the father and the heires of his body, and the father dyeth and the eldeſt ſon levy a fine with proclamations and dyeth without iſſue, this ſhall barre the ſecond ſon for ever for the remainder deſcended to the eldeſt. [g] So if lands be given to an eldeſt ſon and the heires of the body of his father (the father being then dead) and he levy a fine of this land, this will barre the younger brother. [h] But if the iſſue in taile do not make his title by him that did levy the fine, there the fine will not barre, and therefore if my father be tenant in taile, and his brother diſſeiſe him and levy a fine, and he and my father dye, this fine ſhall not barre me as iſſue in taile, becauſe I do not make my title to the land by him: but if I ſuffer five years to paſſe and do not make my claim, &c. by this means I may be barred by the fine. [i] And if the fine be levied of another thing than the thing itſelf entailed, as if the tenant in taile grant by fine a rent, common, or the like out of the land entailed, this fine will not barre the iſſue. So if a rent be entailed and the tenant * in taile of the rent diſſeiſe the terre-tenant of the land out of which the rent doth iſſue, and then levy a fine of the

* P. 24.

1. Iſſue in taile barred by the fine of his anceſtor or ſome other.

c Stat. 4 H. 7. 32 H. 8. Co. ſuper Lit. 372. 1 Co. 9. 138. 140 Dyer 3.

d Dyer 354.

e Co. 3. 90.

f Co. ſuper Lit. 372.

g Curia Trin. 21 Jac. C. B.

h Dier 3.

i Plow. 435.

* P. 25.

(1) Tho' the wife may enter within five years from her huſband's death, and avoid the fine, and thereby become ſeiſed of an eſtate tail, and the remainders reveſted, yet the iſſue is barred, for altho' the whole eſtate tail be in the mother, yet it cannot deſcend from her to the iſſue becauſe they were barred by the father's fine before. *Hob.* 257. *Moor* 28.

land, this is no barre to the iſſue of the rent. 2. Albeit the fine be a double fine with a grant and render, yet it is within theſe ſtatutes, and will barre the iſſue in taile as well as a ſingle fine, ſo as the grant and render be of the land itſelf and not of any profit apprender out of it. And therefore if huſband and wife be tenants in ſpeciall taile, and they levy a fine with proclamations, and the conuſee grant and render the land to them and their heires, this fine will barre the iſſue in taile. And if tenant in taile joyne with *I. S.* and levy a fine to a ſtranger, and the ſtranger doth grant and render the land again to *I. S.* for years, and to the tenant in taile in fee afterwards; the iſſue in taile is barred by this fine. So if there be tenant for life, the remainder in taile, and he in remainder in taile accept of a fine from a ſtranger, and grant and render to the ſtranger again for years with a remainder over, hereby the iſſue in taile is bound. [k] If tenant in taile accept of a fine of the land entailed from a ſtranger, and then grant and render a rent out of the land to the ſtranger by the ſame fine, this will not bind the iſſue in taile to pay the ſame rent. [l] If tenant in taile make a feoffement on condition, and die having two ſiſters inheritable to the taile, and one of them levy a fine with proclamations *ſur releaſe* to the feoffee of the whole, in this caſe it is doubted whether the other ſiſter be barred of her halfe or not. 3. Albeit the tenant in taile dye before all the proclamations be finiſhed, yet when they be finiſhed, as they may be after his death, the iſſues in taile are bound by the fine, for howſoever by the death of the tenant in taile the right of the eſtate taile doth deſcend to the iſſue, yet when the proclamations are paſſed, this right that doth deſcend is bound by the ſtatutes, and the iſſue cannot by any claim, &c. ſave the right of the eſtate taile that doth deſcend unto him. 4. Albeit the iſſue in taile be within age, out of the realm, under coverture, *non compos mentis*, or in priſon, at the time of the fine levied and the proclamations paſſed, yet the eſtate taile is barred by the fine. And therefore if *A.* be tenant for life of land, the remainder to *B.* in taile, the reverſion to *B.* and his heires expectant, and *B.* levy a fine to *C.* and his heires, and hath iſſue and dye before all the proclamations are paſſed, the iſſue in taile being then out of the realm, the proclamations are made, and after the iſſue in taile cometh into the realm and claimeth the remainder in taile upon the land, in this caſe the eſtate taile is barred for ever. 5. Theſe ſtatutes do extend to fines levied by tenant in taile by concluſion, and the iſſue ſhall be bound by the fine of their anceſtor unto whom they are privy in eſtate and bloud, albeit *partes fines nihil habuerunt tempore finis*. And therefore if the iſſue in taile * in the life of his Anceſtor when he hath onely a poſſibility, as if there be grandfather, father, and ſonne, and the grandfather be tenant in taile, and the father levy a fine of the land before the grandfather's death, and then the grandfather dye before the father, and after the father dye, in this caſe the iſſue is barred by this fine: * ſo alſo if the grandfather ſurvive the father (1). But in caſe of a collaterall deſcent, if the collaterall anceſtor die in the life time of his father without iſſue, this fine is no barre, but if he ſurvive his father, *contra.* So if lands be given to the grandfather and

2] Co. 3. 76. 85. ſuper Lit. 353. Bro. fines. 118. Dyer 279.

k Plow. 435.

l Dier 117.

3] Co. 3. 86. 87. in Shelley's caſe.

4] Co. 3. 84. 91.

5] Co. 3. 90. Dier 279. Plow. 435.

* Page 26.

* Curia. Trin. 21. Jac. Com. B. Godfry and Wade's caſe. Dier 48.

(1) The iſſue ſhall be barred by his father's fine, for though he claims from the grandfather, yet he derives his title from the blood of his father. 3 *Co.* 90. *b.* *Hob.* 333.

his

his wife in ſpeciall taile, and the grandfather dieth, and the father doth diſſeiſe the grandmother, and doth levy a fine with proclamations, the grandmother dieth, and then the father dieth, in this caſe the ſonne is barred. [m] So if lands be conveyed in taile to a woman for her jointure within the ſtatute of 11 *H.* 7. *cap.* 20. and whiles ſhe liveth the iſſue in taile doth levy a fine of the land, by this the iſſues inheritable to the eſtate taile are barred for ever. [n] So if tenant in taile make a feoffment or be diſſeiſed, and after levy a fine with proclamations to a ſtranger, hereby his iſſues are barred for ever. [o] So if tenant in taile die, and his iſſue before his entry (having a freehold in law only) doth levy a fine with proclamations, this ſhall be a barre to his iſſues and to his collaterall heires and brothers of the halfe bloud. [p] So if a tenant in taile have four daughters and one of them levy a fine in the life of the father, this will be a barre to her iſſue for the fourth part of the land. [q] But in theſe caſes before and ſuch like, where the iſſue in taile doth levy a fine in the life time of the tenant in tail, the tenant in taile himſelf may after levy a fine of the land, and thereby barre his iſſue, and the conuſee alſo to whom his iſſue hath levied a fine, and therefore in all theſe caſes it is ſuppoſed that the tenant in taile doth dye and ſuffer the right to deſcend to his iſſue. [r] If lands be given by will to one when he ſhall come to his age of twenty four years, to hold to him and the heires of his body, and he after his age of twenty one years levy a fine of this land with proclamations, this is a barre to the iſſue in taile (1). If a diſſeiſor make a gift in taile, and the donee make a feoffment to *A.* and after levy a fine with proclamations to *B.* that hath nothing in the land, this fine will barre the iſſues in taile and they ſhall not avoid it by pleading that *partes finis nihil habuerunt &c.* but it is no barre to the diſſeiſee, for he may avoid it by this plea when he will. [s] And *à fortiori* therefore, if a fine be levied by the tenant in taile that hath only an eſtate of freehold in remainder or reverſion, it is good; as if *A.* be tenant for life, the remainder to *B.* in taile, and *B.* levy a fine, albeit this be no diſcontinuance, yet it is a barre to the eſtate taile. [t] But if tenant in taile have iſſue a ſonne and a daughter, and the ſonne, living the tenant in taile, levy a fine and dye withont * iſſue, and then the tenant in taile dieth, by this the daughter and the eſtate taile is not barrred. So if the younger ſonne levy a fine in the life of the father, and then the tenant in taile die, this is no barre to the elder ſonne. So if lands be given to a man and the heires females of his body, and he hath a ſonne and a daughter, and the ſonne doth levy a fine of the land, this is no barre to the daughter. So if tenant in taile have a daughter, his wife being with child of a ſonne, and the daughter levy a fine, and after the ſonne is born, this fine ſhall not barre the ſonne, for theſe howbeit they be privies and heires to the bloud, yet are not privies and heires to the eſtate. 6. Albeit the eſtate, paſſed by the fine, be afterwards, before all the proclamations had, avoided, yet the iſſue in taile is barred by it. And therefore if tenant in taile diſcontinue in fee, and after diſſeiſe the diſcontinuee and levy a fine with proclamations to a ſtranger, and take an eſtate back by render in

Discontinuance.

* P. 27.

[m] Co. 3. 56, 51. 9. 140.

[n] Plow. 434, 435.

[o] Curia. 21. Jac. Co. B.

[p] Idem.

[q] Co. 3. 50, 51. 9. 140.

[r] Co. 10. 50. 9. 141. 3. 50, 51.

[s] Co. 3. 84.

[t] Trin. 25. Jac. Co. B. Will. Godfrey verſus Wade's.

[6] Co. 3. 91.

(1) See accordingly the caſe of *Johnſon* v. *Gabriel* in *Cro. Eliz.* 122. and cited afterwards in the ſame book *f.* 610, in *Hunt* v. *King*.

the ſame fine, and the diſcontinuee before all the proclamations paſſe, enter and claim and ſo avoid the fine, yet hereby the eſtate taile is barred. [u] And if tenant in taile infeoffe the iſſue in taile, and after diſſeiſe him and levy a fine, the iſſue enter, and after the proclamations paſſe, and after the iſſue in taile doth infeoffe the tenant in taile which levied the fine, and dyeth, it ſeems this fine ſhall barre the iſſues in taile. 7. This [7] is a barre to the eſtate taile and to the iſſues onely, and is no barre to him in remainder or reverſion; and therefore when the eſtate taile is ſpent, this barre is at an end. And therefore if an eſtate be limited to *A.* and *B.* his wife and the heires males of the body of *A.* the remainder to *C.* and *A.* and *B.* have iſſue and *A.* dye, and *B.* and her iſſue, or her iſſue alone levy a fine, this will barre the iſſues of the iſſues whiles there be any, but if they fail it will not barre *C.* in remainder, except he ſuffer five years to paſſe, and ſo be barred by his *non-claim*. So if tenant for life and he that is next in the remainder in taile joyn in a fine, this is a good barre to the iſſues in taile for ever as long as that eſtate taile ſhall continue, but not to him that is next in remainder, nor to any other that ſhall come in of any remainder in taile or in fee, nor to him in reverſion. [x] If lands be given to *A.* and the heires males of his body, the remainder to *B.* and the heires males of his body, the remainder to the right heires of *A.* and *A.* doth bargain and ſell this land by deed indented and inrolled to *I. S.* and his heires, and after levy a fine of it *ſur Conuſance de droit come ceo &c.* to him and his heires, by this the remainder to *B.* is not diſcontinued, but it is a barre to the eſtate taile by the ſtatutes, and cauſeth the eſtate of the bargainee to laſt ſo long as the tenant in taile hath iſſues of his body; but if the fine had been before the bargain and ſale it had been a diſcontinuance of the remainder, but in neither caſe a barre to him in remainder, unleſſe * he ſuffer himſelf to be barred by his non-claim within five years after his remainder happen to come in poſſeſſion. 8. If there be tenant in taile, the remainder to him in taile, and the tenant in taile levie a fine of this land, hereby both his eſtates are barred (1). *Et ſic de ſimilibus.* [y] But all this notwithſtanding, if lands be conveyed to a woman in taile for her joynture within the ſtatute of 11 *H.* 7. *chap.* 20. and ſhe levie a fine of this land, this will not barre the iſſues in taile (2). Or if lands be given in taile to any ſubject by the King's own gift or proviſion, and the tenant in taile levie a fine, this fine ſhall not bind the iſſues in taile nor the King, but others it will barre, for theſe fines are not intended within, but excepted out of the ſtatute of 32 *H.* 8. but the King himſelf, being tenant in taile of the gift of ſome of his anceſtors being ſubjects, may levy a fine of it to barre his iſſues in taile. And in all caſes where a recovery will not barre the iſſues in taile, there a fine will not barre them.

Diſcontinuance.

* P. 28.

2 Wife barred by the fine of her huſband or ſome other.

Albeit the fine of the huſband and wife together of the wife's land, or of the land of the huſband and wife together, be a

[u] Per Popham et Fenner, Juſt. M. 39, 40. Eliz. B. R.

[7] Co. 1. 76. ſuper Lit. 372.

[x] Co. 10. 96. & 9 Jac. B. R.

[8] Co. ſuper Lit. 372.

[y] Bro. Fines, 122. Co. 6, 55. Dier. 4. Co. ſuper Lit. 372. Co. 8. 17. 78.

Dier 72. Plow. 373.

(1) See further as to the operation of a fine in barring the iſſue in tail, *Bac. Abr.* Fines, (E) *Com. Dig.* Eſtate, (B. 22.) (B. 25.)

(2) *A.* ſeiſed in fee, levied a fine to himſelf for life, remainder to his wife in tail male for her jointure, and had iſſue male; huſband and wife levied a fine and ſuffered a recovery.—After the death of the huſband and wife, iſſue male entered by force of the ſtatute of 11 *H.* 7. and held lawful, this caſe out of the letter, tho' within the remedy of the ſtatute, for ſhe neither levied the fine, *&c. being ſole*, or *with any after taken huſband*, but by herſelf with her huſband who made the jointure. *Co. Lit.* 365. *b.* See further *Vin. Abr.* Jointreſs (I) (K)

perpetuall

perpetuall baare to her and her heires for ever, yet if the husband alone levy a fine with proclamations of such land, and then he die, in this case she is not barred of her right, but if she doe not make her claim, *&c.* within five years after her husband's death she is barred of her right for ever, notwithstanding the statute of 32 *H.* 8. (1). [a] And if one seised of land in fee marry a wife, and after make a lease of this land to *A.* for life, the remainder to *B.* in fee, and *B.* levie a fine with proclamations, and the husband die, and the wife doe not make her claime, *&c.* within five years after the death of her husband, hereby she is barred of her dower for ever notwithstanding the estate for life in *A.* but if the remainder of *B.* had been put to a right at the time of the fine levied she might have avoided the fine by plea, *quod partes finis nihil habuerunt*, *&c.* [b] And if the husband levy a fine of his own land and die, and his widow having no impediment doth not make her claim within five years after his death, hereby she is barred of her dower for ever. [c] If a jointure be made to a woman after the coverture, and her husband and she levie a fine of it; hereby without question she is barred of her jointure in this land, but it is thought that this is no barre of her dower in the residue of the land of the husband, and especially then when the fine is *Sur conusance de droit come ceo, &c.* (2). [d] If lands be given to a man and his wife in taile, the remainder to the right heires of the husband, and the husband alone levie a fine of this, this will not barre the wife, except she suffer five years to passe after his death without making claim, &c. and therefore if the fine be to the use of the husband and his heirs in fee, he may dispose it as a fee simple, and his issue hath no remedy.

a M. 18. Jac. Co. B. in Anne Twiss's case.

b Dier 224. Co. 2. 93.

c. Dier 358.

d Dier 352.

[*] If a man disseise me of the land I have in fee simple, or fee-taile, and after levy a fine of this land with proclamations, and I do not make my claim, *&c.* within five years after the proclamations had, hereby I and my heires are barred for ever of this land (3). And if I being such a tenant in fee make a lease for years, or be the Lord of any copyhold-estate, and my lessee for years, or copyholder in fee or for life, be ousted, and I thereby disseised, and the disseisor levy a fine, and neither I nor my lessee for years, or copyholder, do make any claim, &c. within the five years after the fine levied, hereby we are all barred for ever. And if one disseise me of land, and after make a lease for life of it, and then levy a fine with proclamations, and I suffer five years to passe, hereby I am barred both of the reversion and of the estate for life also.

Co. 9. 105. 3. 87. super Lit. 298.

[*] P. 29.

3. Disseisee and the like barred by the fine of the disseisor, &c.

If tenant for life make a feoffment in fee, and the feoffee levy a fine with proclamations, and he in reversion or remainder

Plow. in Stowel's case.

(1) In a fine of the wife's land by husband and wife, the whole estate passeth from the wife, and the conusee is in by her only; and if the husband and wife reverse the fine by writ of error for the nonage of the wife, the whole estate which passed by the fine shall be restored to the wife. 2 *Co.* 57. *b.*

(2) For she has not her election of jointure or dower till her husband's death; but if the jointure be made *before* the coverture, and after the husband and wife alien those jointure lands by fine, she shall not be endowed of any other of her husband's lands. *Co. Lit.* 36. *b.* Tho' the law does not relieve feme coverts who thus voluntarily alien their jointure lands, yet if the title to any jointure made before marriage proves to be bad either by fraud or accident, and the jointress is evicted, she shall then (by the provisions of the statute of 27 *H.* 8. *c.* 10.) have her dower *pro tanto*, at the common law, 2 *Bl. Com.* 138. See further *Bac. Abr.* Jointure (C), and fully as to fines by baron and feme in *Vin. Abr.* Fine. (T) (B b) (C b)

(3) The issue in tail shall not have five years, after the death of the tenant in tail the disseisee, for the father had a present right to the intail. *Plow.* 374. *a.* but if tenant in tail bargains and sells in fee, and the bargainee levies a fine, tho' five years pass in the life of the bargainor, the issue in tail shall not be bound, but shall have five years from the death of his father. *Penision* v. *Lister*, *Cro. Eliz.* 896.

doe not make his claim, *&c.* within five years, hereby he is barred for ever.

If I pretend right or title to land, and enter upon it, and put him out that is in poſſeſſion, and then I levy a fine with proclamations, with an intent to barre him, and he doth not make his claim, *&c.* within five years, hereby he is barred for ever, albeit he had the true right and I no right at all. Co. 3. 79.

If I purchaſe land of *H.* and after perceiving my title defeaſible, and that a ſtranger hath the right of the land, I do levy a fine to, or take a fine from another with proclamations with intent and of purpoſe to barre him that hath right, and he ſuffer five years to paſſe, and doth not make his claim, &c. hereby he is barred of his right for ever. And in theſe and ſuch like caſes, there is no reliefe to be had in equity (1). See more in Numb. 11. *infra*. Co. 3. 79. Doct. & St. 83. 155.

Equity.

9. Where a fine ſhall be a barre as to one perſon, and not to another, or as to one part of the land, and not to another.

If there be tenant in taile, the remainder in taile, and the tenant in taile bargain and ſell the land by deed indented and inrolled, and after levy a fine with proclamations to the bargainee *ſur conuſance de droit come ceo, &c.* in this caſe as to the tenant in taile and his iſſue this is a barre, but as to all others it is no barre, albeit they never make any claim, *&c.* So if tenant in taile levy a fine of his intailed land, this is a barre as to him and his iſſues, but as to all others it is no barre at all, and therefore he in remainder or reverſion in their times may enter notwithſtanding. [e] So if lands be entailed to the huſband and wife, and the heires of their two bodies, and the huſband alone levy a fine of this land, this as to the husband tenant in taile and his iſſues is a barre, but not as to the wife, for ſhe ſhall be tenant in taile ſtill, and yet it ſeems ſhe may not ſuffer a recovery of this land afterwards. So if a man attainted of felony or treaſon levy a fine of his land, this as to the King and Lord of whom the land is held is void, and is no barre to their advantage * and title of forfeiture, but as to all others it is a good barre. [f] So if one levy a fine of lands in ancient demeſne and of other lands together, this as to the lands in ancient demeſne is not good, nor any barre at all, but as to the other lands it is a good barre (2). Co. 10. 95. 9. 106. e Co. 9. 140, 142. f 7 H. 4. 44. F. N. B. 98.

Recovery.

* P. 30.

10. The time of claime, and within what time he that hath right to land muſt make his claime, &c. to prevent the barre of the fine.

By the ancient common law, he that had right, was bound to make claim, *&c.* within a year and a day after the fine levied and execution thereupon, or elſe he was barred for ever, but this barre by *non-claime* is now gone, and if ſuch a fine without proclamations be levied at this day, he that hath right may make his claim at any time to prevent the barre, and avoid the force of the fine. Co. ſuper. Lit. 254, 262.

Parties.

Parties to fines, void of impediment at the time of the fine levied, are barred of the land preſently, and ſhall have no time to avoid the ſame fine by entrie, claim, *&c.* Stat. 1. R. 3. ch. 7. 4 H. 7. ch. 24.

Privies

And privies in bloud, and privies in repreſentation, claiming by the ſame title which their anceſtor that levied the ſame fine had, ſhall be barred by the ſame fine preſently, and that whether they have any impediment or not.

Eſtrangers.

1. That have preſent right and no impediment.

Eſtrangers to fines, (being all ſuch as are neither parties nor privies) who have right to the land whereof the fine is levied, and have no impediment naturall or legall, ſhall have time to make their claim, *&c.* within five years after the fine levied See the Stat. Plow. 374. Co. 9. 105.

(1) See further who ſhall be bound by a fine, 2 *Atk.* 631. 1 *Wood* 573. *Vin. Abr.* Fine, (S).

(2) But may be avoided, as to the land in ancient demeſne, by a writ of diſceit. *Fitz. Nat. Br.* 98. P. ſee ante 22, note 2.

and

and proclamations had, and no longer. And therefore if leſſee for years, tenant by elegit, or by ſtatute, or a copyholder in fee, or for life, be ouſted, and he in reverſion diſſeiſed, they ſhall have but one five years between them to make their claim, *&c.* and if they claim not within that time they are all barred for ever, for they have all preſent right and may bring their action preſently: but otherwiſe it is where the tenant for life, and he in reverſion be diſſeiſed; for in this caſe he in reverſion is not barred by the firſt five years after the fine levied, for in that time he can have no action, therefore he ſhall have time to make his claim five years after the death of the tenant for life.

g Plow. 356. 375. g If a diſſeiſor levie a fine with proclamations of the land whereof the diſſeiſin was, the diſſeiſee muſt make his claim within the firſt five years after the proclamations had, and if he happen to dye within the five years, his heire ſhall not have five years more, but ſo much time more, as to make up the time incurred in his father or other anceſtors time, five years; and albeit he be an infant at the time of his anceſtors death, yet he ſhall have no longer time.

h 19 H. 8. 7. Plow. 374. Dyer 3. h If a tenant in taile be diſſeiſed, and the diſſeiſor levy a fine, the tenant in taile or his iſſues muſt make their claim within the next five years after the proclamations paſſed, otherwiſe they ſhall be barred for ever. The like it is in the lacheſſe of him in remainder or reverſion.

i Co. 100. i And if in theſe and ſuch like caſes, he that hath preſent right and is without impediment bring upon himſelf any impediment, as if being within the realm at the time when the fine is levied, he do * afterwards goe beyond the ſea, or the like, in theſe caſes he ſhall have no longer time than the firſt five years after the proclamations had,

* P. 31.

2. That have preſent right and impediment.

Infant.

See the ſtatutes. Plow. 339 Dier 3. Plow. 367. 377. Eſtrangers to fines peſtered with impediments of infancy, coverture, madneſſe, idiocy, lunacy, impriſonment, or abſence out of the realm, at the time of the levying of the fine, and having then any preſent intereſt or right ſhall have five years time after the infirmity removed to make their claim, &c. And therefore an infant regularly ſhall have time for five years after he come to his full age to make his claim, *&c.* although he be in his mother's womb at the time of the fine levyed. And yet if my father's brother diſſeiſe him, and levy a fine with proclamations, and a year after the proclamations my father dyeth, and after and within five years my uncle dyeth, in this caſe I by reaſon of my infancy ſhall have only ſo much time to avoid the ſame as at the death of my father remained to come of the five years next after the proclamations, and not a new five years, becauſe I claim by the ſame title that my father had. So if my father or other anceſtor be diſſeiſed, and the diſſeiſor levy a fine with proclamations, and my father or anceſtor dye within five years after the proclamations, in this caſe I ſhall not have a new five years, but only ſo much as remaineth of the old five years to make my claim, *&c.*

Non ſanæ memoriæ,

Plow. 366. 375. Madmen and lunatickes (being ſtrangers to the fine) ſhall have the like time to make their claim, *&c.* as infants have, and yet if this infirmity happen after the fine levied, and before the laſt proclamation be made, theſe perſons are not bound to the firſt years, but ſhall have five years time after they be cured of their maladies.

Women Covert.

Plow. 375. 379. Women covert (eſtrangers to the fine) ſhall have five years time after they be diſcovert to purſue their right. But if a *feme ſole* (eſtranger to a fine) have preſent right, and after the fine levied ſhe take a huſband, and ſo five years paſſe after the proclamations had, in this caſe ſhe is barred

barred and ſhall have no further time to claim. Eſtrangers to fines, impriſoned at the time of the fine levied, ſhall have the ſame time and liberty infants have, but if ſuch impriſonment happen after the time of the fine levied and before the laſt proclamation made, it ſeemeth they ſhall have five years after the inlargement. And eſtrangers to fines being out of the realm at the time of the levying thereof ſhall have five years time after their return to enter or claim, *&c.* But if they be in *England* at the time of levying of the fine, and after go beyond the ſeas, and ſuffer the five years after the proclamations to paſſe, in this caſe they ſhall have no longer time, except they be ſent in the King's ſervice and by his commandement. [k] And if the party be beyond the ſea at the time of the fine levyed, and never return but dye there, it ſeems in this caſe the fine will not barre his heire at all (1).

Impriſonment. Plow. 360. 366. 375.

Out of England. Plow. 366.

k Sr. Tho. Cotton's caſe 27 Eliz.

* P. 32.

3. That have divers defects.

* Eſtrangers to fines that have divers defects and infirmities, as infancy, coverture, non-ſanity of minde, impriſonment, abſence out of the realm, to avoid fines ſhall have time for five years after the laſt of the infirmities removed. But if they have divers impediments, and they be all once after the proclamations made wholly removed and after they fall into the like again and dye, in this caſe their heires ſhall not have a new five years, but the firſt five years begun in their anceſtors time immediately after the firſt impediments ſo removed ſhall proceed, and *non-claime* of their heires during all the reſidue of the ſaid five years bindeth them, as their ſaid anceſtors ſhould have been bound thereby if they had remained void of ſuch impediments during all the ſaid five years.

Plow. 375. Dier 133.

4. That are without impediment having future right upon cauſe precedent.

Eſtrangers to fines that have no preſent, but a future right, and that ſuch as groweth wholly before the proclamations, if they be void of impediment ſhall have five years time after their right, title, claim or intereſt firſt groweth, remaineth, deſcendeth or commeth to them after the proclamations. And therefore if a mortgagee be diſſeiſed, and the diſſeiſor doth levy a fine with proclamations, and the five years paſſe, and after the mortgagor payeth or tendereth the money, in this caſe he ſhall have time for five years after the tender or payment of the money to make his claim, *&c.* (2). So if a man levy a fine of his land whereof his wife is dowable, ſhe ſhall have five years after her huſband's death to make her claim, *&c.* and not be bound by the five years after the fine. [l] So if tenant in taile levy a fine with proclamations, and after the five years dyeth without iſſue, the donor ſhall have five years after his death without iſſue to bring his *Formedon* (3). [m] So if leſſee for life levy a fine, or make a feoffment in fee, and the feoffee doth

Plow. 373. Dier 224.

l Plow. 374.

m Co. 78. Plow. 373. 374.

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(1) And his heirs may enter or take their action at any time. 2 *Inſt.* 519. 4 *Co.* 125. *b.* See alſo *Chet.* 65. to 68. where the different opinions of Ld. *Coke* in his 2 *Inſt.* and of Ch. J. *Anderſon* in 1 *Leon.* 211. on *Cotton*'s caſe are ſtated and left to the readers judgment. From an opinion given by a late ſound lawyer and able conveyancer on this point, it ſeems he thought that the caſe in *Leonard*, tho' it might relate to the ſame family of the *Cottons* as the caſe in 2 *Inſt.* 519, aroſe probably under ſome other ſettlement or limitation, than that mentioned in 2 *Inſt.*; and that Ld. *Coke*'s opinion was good law.

(2) For his title firſt accrued to him after the proclamations by the payment or tender, upon cauſe or matter before the proclamations, *viz.* by the condition made before the fine. *Plow.* 373. If a fine is levied by a mortgagee in poſſeſſion, and five years nonclaim paſs thereon, the mortgagor is not barred of his equity of redemption. 1 *Vern.* 132.

(3) In the reverter, which action lieth where there is a gift in tail, and afterwards by the death of the donee or his heirs without iſſue of his body, the reverſion falls in upon the donor, his heirs, or aſſigns. *Fitz. Nat. Br.* 219. E.

levy a fine; in this caſe he in reverſion or remainder ſhall not be bound by the next five years after the fine levied, but he ſhall have five years next after the death of the tenant for life, and if he dye within the five years, his heirs ſhall have only ſo much time as to make up the time before his death five years. [n] So alſo is the law if deſſee for life be diſſeiſed, and the diſſeiſor or a ſtranger levy a fine, in this caſe he in reverſion or his heires ſhall have five years after the death of the tenant for life, and ſhall not be bound to the next five years after the time of the fine levied. [o] So if tenant in taile in poſſeſſion levy a fine and dye without iſſue, in this caſe he in the remainder ſhall have time for five years after the death of the tenant in taile without iſſue; and if he make not his claim, *&c.* in that time, he and his iſſues are barred for ever (1). The ſame law is for him in reverſion, or the donor, if there be no remainder. [p] And if tenant in taile diſcontinue in fee, and the diſcontinuee levieth a fine with proclamations, and five years doe paſſe, and the tenant in taile dieth, in * this caſe his iſſue ſhall have five years after the deſcender to bring his *Formedon* (2). [q] But if tenant in taile diſcontinue rendring rent and dye, and the iſſue accept the rent (which doth barre him for his time) and then the diſcontinuee levieth a fine and dyeth, in this caſe the iſſue of the iſſue ſhall not be barred by the five years after the fine, but ſhall have five years after the death of the iſſue. [r] And if one *de non ſanæ memoriæ* make a feoffment, and the feoffee levy a fine, and then the feoffer die; in this caſe the heire ſhall have five years after the death of his anceſtor, and not be bound by the five years next after the fine levied.

n Plow. 374. Co. 9. 305.

o Plow. 374. 19 H. 8. 7. Co. 3. 87. 84. Dier 3.

p Co. 3. 87.

* P. 33.

q 30 El.

r Plow. 374.

5. That have future right and impediment.

See the Statutes Plow. 366, 367. Dyer 3. Plow. 358.

5. Eſtuangers to fines, that have future right upon any cauſe precedent, being affected with ſuch impediments when the right firſt accreweth, ſhall have five years after the impediment removed to make their claim, *&c.* And therefore infants that are born, or in their mothers wombe when ſuch right doth happen to them, women covert, mad men, lunaticks, priſoners beyond the ſeas, ſhall have this time. As if a man have iſſue a ſon and a daughter, and the ſon doth purchaſe lands and die, and the daughter entreth as his heire, and is diſſeiſed by *A.* who levieth a fine, and five years paſs without claim, and tenne years after the father hath another ſonne who is heire to his brother; he ſhall have in this caſe a new full five years after he come to his full age, for he is the firſt unto whom the right deſcended after the proclamations. But if a ſtranger to a fine, to whom a remainder or other title firſt accreweth after the fine, doe not purſue his right within five years, hereby he and his iſſues are barred for ever. And in like manner if the firſt iſſue in taile, to whom the title of the taile firſt accreweth, neglect to make his claim, *&c.* within the firſt five years after his title accrewed, hereby he is bound for ever, and the whole eſtate taile alſo. And if one abate after the death of a tenant in fee-ſimple, and make a feoffment upon condition, and the

(1) If tenant in tail makes a leaſe purſuant to the ſtatute 32 *H.* 8, and then levies a fine, and dies without iſſue, and afterwards the leaſe expires, the reverſioner ought to enter within five years after the death without iſſue (the time when his right accrued) and ſhall not have five years after the term expired, for he had not then a new right. *Cro. Car.* 156.

(2) But if tenant in tail diſcontinue in fee and dies, and the diſcontinuee makes a leaſe for life, and grants the reverſion to the iſſue, the iſſue in tail ſhall not have a formedon againſt the tenant for life, becauſe by his formedon he muſt recover the eſtate of inheritance, and that is in himſelf, *Co. Lit.* 297. *b.* ſee further what ſhall be deemed a diſcontinuance and the remedies thereon by formedon in deſcender, reverter, and remainder, in *Finch's law*, 190, 267. *Co. Lit.* 326. *b.*

feoffee

feoffee levy a fine, and five years paſſe without any claime made by his heire, hereby the heire is barred for the preſent, but if afterwards the condition be broken, and the abator enter, then the heire may have an aſſiſe of mordanceſter againſt the abator, or enter when he will.

6 That have no right for any cauſe before the fine.

Eſtrangers to fines that have neither preſent nor future right at the time of the levying of the ſame fines by reaſon of any matter before the fines levied, whoſe right groweth entirely before the proclamations, or partly before and partly after, may make their claim, *&c.* when they pleaſe. As if a father dye ſeiſed of land his elder ſonne being profeſſed, and the younger ſonne entereth and is diſſeiſed, and a fine with proclamations is levyed, and then the elder ſonne is dearraigned, in this caſe it ſeems he is bound to no time (1). So if a tenant ceaſe one year, and then a fine with proclamations is levied, and after the tenant ceaſeth another year, the Lord may * have his *Ceſſavit* twenty years after the proclamations. Plow. in Stowel's caſe.

* P. 34.

7. That have future rights by divers titles

And eſtrangers to fines, that have ſeverall future rights by divers titles growing at ſeveral times, it ſeemeth ſhall have ſeverall five years to make their claims, *&c.* commencing from the ſeveral times that their titles do firſt accrew unto them. As if tenant for life, the remainder in fee, make a feoffment in fee, and the feoffee levy a fine with proclamations, and he in the remainder ſuffer the five years to paſſe, in this caſe he is barred of his entrie upon the alienation for the forfeiture, but it hath been held that if the tenant for life die, that he ſhall have another five years time to bring his *Formedon* in the remainder. So if the huſband make a feoffment of his wife's land to another upon condition, which is broken, and he levieth a fine of this land, and the huſband hath iſſue by his wife and dieth; and the firſt five years paſſe, and then his wife dieth, hereby he is barred of the title by the condition, but he ſhall have five years more to make his claim as heire to his mother. But if lands be given to *H.* for the life of *A.* the remainder to *B.* for life, the remainder to *H.* in fee, and *H.* is diſſeiſed, and after the diſſeiſor levy a fine, and five years paſſe; in this caſe *H.* is barred both of his preſent and future eſtate, and ſhall have no further time to make his claim, *&c.* and yet if *Ceſtuy que vie* and he in the meane remainder die, *H.* ſhall have another five years to make his claim to preſerve his remainder. In like manner it is if land be given to *H.* for the life of *A.* the remainder to him for the life of *B.* the remainder to him for the life of *C.* and he is diſſeiſed, and the diſſeiſor levyeth a fine with proclamations; in this caſe, ſome ſay *H.* for his preſent right ſhall have five years by the firſt ſaving of the ſtatute, and five years after the death of *A.* by the ſecond ſaving of the ſtatute. If one diſſeiſe a feme ſole, and after marry her and have iſſue by her, and the huſband is diſſeiſed before marriage or after, and then a fine is levied with proclamations, and the huſband dieth firſt, and afterwards the wife dieth within the five years, the iſſue being of full age, the five years paſſe, hereby he is bound as heir to his father, but he ſhall have five years more after the death of his mother to make his claim, &c. *Quando duo jura in una perſona concurrunt, æquum eſt ac ſi eſſent in diverſis* (2). Plow. 537. 367. 372. Plow. 357. 368. 372.

(1) As to the doctrine of profeſſion, ſee *Vin. Abr.* Profeſſion, and the ſeveral titles there referred to.
(2) See further how the five years nonclaim ſhall be accounted. *Vin. Abr.* Fine (H. a.)

Where

Co. 10. 96. 2. in Crom-wel's case.

11. How a fine shall enure and work.

Where there is a precedent agreement amongst the parties as a feoffment or the like, there the fine shall not passe any thing, nor worke by way of estoppell, but onely by way of corroboration, and shall be guided by the precedent agreement. And therefore if a feoffment be made to two and their heires, and after a fine is levied to them two and the heires of one of them, this shall enure as a release, and shall not alter the estate, but if there be no precedent agreement it shall work as it may.

Dyer 157. Fitz. Estoppell 211. Co. 2. in Cromwel's case.

If *A.* enfeoffe *B.* of certain land in fee, rendring rent, with condition of re-entrie for not payment of rent, and by indenture at the * same time covenant to levy a fine of the same land to the feoffee to the uses and conditions in the deed of feoffment, and after a fine is levied *sur conusance de droit come ceo* &c. accordingly, in this case this fine shall enure as a fine *sur release*, because the conusee hath the fee before, and it shall not enure by way of estoppell, albeit it be a fine *sur conusance de droit come ceo* &c. And therefore the rent and condition shall remaine in this case, and not be extinct.

* P. 35.

Estoppell. Extinguishment.

See before at Numb. 6. part 2. F. N. B. 20. f. Stat. 23. El. chap. 3.

1. Where a fine may be avoided, or not. And how. 1. By a writ of error.

A fine may be avoyded for many causes, as by the death of the parties after the conusance before the recording of it, or by covin in the procuring of it; also it may be avoided for other causes, as for some error in the proceeding in the suing out of the fine, and this is done by writ of error; but this error then that shall make a fine voidable must be notorious, because the thing is done by consent, and it is a rule in law *Consensus tollit errorem.* (1). And by this means if the husband and wife levy a fine, and both of them be within age, whiles either of them be within age they may avoid the fine as against them both. But if there be tenant for life, and he in remainder in taile being an infant, and they two levie a fine, and he in remainder reverse it for infancy, this shall not avoid the fine as to the tenant for life also (2). A fine also is and may be sometimes avoided, or at least lose much of force by the claim, entry, or action of him that hath right to the land (3): for if the estate, contained in a fine, be once within five yeares after proclamations lawfully defeated, the party hath thereby left his whole estate both against him which did reverse the same, and against all others which had right or title paramount and made no claime within the five yeares, albeit he which doth bring the action have no judgement and execution within seven yeares after the proclamations. In like manner if there be tenant for life, the remainder for life, the remainder in fee, and the first tenant for life alien, and the alienee levy a fine with proclamations, and the second tenant for life claim, or enter, *&c.* this doth make void the fine both against him, and against him in remainder also: for it is a rule, that any one that hath any estate in possession or reversion which will be barred by the fine when it is levied, may make a claim or entry to prevent the bar of the fine. As tenant for his own, or for another's life, tenant for years, he in reversion or remainder after an estate for

Co. 2. 77. 3. 76.

Plow. 358. 359. Co. 9, 106.

2. By a claime, entrie, &c. And by whom a claim, &c. may be made.

(1) All writs of error for reversing of fines, must be brought and prosecuted with effect within twenty years after the time of levying them, according to statute 10 & 11 *W.* 3. *c.* 14. with a proviso as to persons under impediments, who are allowed five years after the impediments are removed.

(2) But in *Zouch* v. *Thompson*, 1 Ld. *Raym.* 179. it was adjudged that tho' a fine may be reversed as to part of the land, and remain good as to the residue, yet it cannot be reversed *in toto*, as to one man, and remain good *in toto*, as to another.

(3) To avoid a fine there must be an *actual entry*, 3 *Burr.* 1897, and by statute 4 *Anne*, *c.* 16. §. 16. no claim or entry to avoid a fine with proclamations shall be sufficient, unless an action be commenced within one year next after such entry or claim, and prosecuted with effect.

life or years, a copyholder, or the Lord, a Gardian in nature, or nurture, may avoid a fine. And this they may doe for themselves and others, and for others without authority precedent or assent subsequent, and the claim of one of them in this case shall avail the other. And by authority also any other man may make a claim, entry, *&c.* in this case, for him that hath right, and so he may doe also without any authority precedent, if the party for whom he doth it doe afterwards agree and assent unto it. But a * stranger of his owne head (unlesse perhaps it be for an infant) cannot make such a claime or entry to prevent the barre of a fine, except he that hath the right doe give him authority before it be done, so to doe, or do agree to it after it is done. And therefore if a stranger of his owne head will make an entry or claime into land whereof a fine is levied, whereunto I have right, and he doe it to my use, and I do not agree to it within the five years, this entry or claime will not avoid the fine (1). And yet it was held by Just. *Dodridge*, *M.* 2. *Car. B. R.* that if a stranger enter in my name and to my use that have the right, this doth vest the estate in me before agreement, and I shall be said to agree untill I do disagree.

* Page 36.

3. By a plea. A fine also is, and sometimes may be avoyded by plea, as by averment of the continuance of seisin of the land in another, at, and before the time of the fine levied, and that *partes finis nihil habuerunt tempore levationis finis*, and then he must shew in whom the estate was. As if lessee for yeares, or a disseisee, levie a fine to a stranger that hath nothing in the land, or *A.* be disseised by *B.* and *B.* be disseised by *C.* and *B.* levy a fine to *D* or one that hath a right of a remainder onely, or a disseisor make a gift in taile, and the donee make a feoffment to *A.* and after levie a fine to a stranger that hath nothing in the land. But this plea it seems neither parties nor privies, albeit they be issues in taile, may have at this day (2), but strangers onely; and therefore in the last case, the disseisor, and not the issue in taile, may avoyde this fine by this plea. But if a collaterall ancestour, of whom the issue in taile doth not claime the land, levie such a fine, the issue may by this plea avoyd it. It seemes also the issue in taile may have this plea to a fine *sur release* onely. Stat. 4 H. 7. c. 24 Co. 3. 141. 88. Dyer. 334.

Also there is a plea by which (as it seems) a fine hath been avoydable, which in effect is nothing else but an averment of seisin still in the demandant or plaintiffe, or his heires, before, at, and after the time of the fine levied. And this plea (as it seems) no man may have at this day but the issue in taile onely, to avoid a fine levied *Sur grant & render*, by the ancestor in taile, and not to avoid a fine levied *Sur conusance de droit come ceo que il ad de son done*, &c. and a feme covert, to avoid a fine levied by her husband alone. Co. 3. 84. Dyer 334. 290. Stat. 27 E. 1. c. 1.

4. By a vacat. If there be two of one name, and one of them levy a fine of the land of the other, or a stranger levy a fine in the name of him that is owner of the land; in both these cases the fine may be avoyded by pleading the speciall matter. And yet some hold 34 H. 6. 19. 19 H. 6. 44.

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(1) An entry on the land by a *cestuique trust* is not a sufficient claim to avoid a fine, but it must be by subpœna, 1 *Cha. Ca.* 268, 278, but it is said claim to avoid a fine by *bill in Chancery* is not sufficient, and *that it ought to be by action.* per Catlin, *Dal.* 116. *pl.* 9, 16 *Eliz. Anon.* See further *Vin. Abr.* Fine, (G a.) *Com. Dig.* Claim (B.)

(2) for they are debarred the plea *quod partes finis*, &c. by the statute 27 *Ed.* 1. *de finibus levatis.* 2 *Inst.* 522. *Heb.* 333.

that in this caſe the party hath no remedy but by action of diſceit (1).

A fine alſo is, and ſometimes may be, avoyded by the ſentence of a court, when it appeareth to be gotten and obtained by ſome notorious fraud or practiſe (2).

* And now it is high time we come to the ſecond kind of common aſſurances made by matter of record, *viz.* a common recovery (3). * P. 37.

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(1) See further in what caſes a fine may be avoided by a plea. *Vin. Abr.* Fine, (G. b. 3.) and 22 *Co. Read.*

(2) In ſome caſes the court will vacate a fine upon motion, to prevent the parties the trouble and expence of a writ of error. 3 *Lev.* 36. 2 *Wilſ. Rep.* 115. When fines may be ſet aſide in equity, 1 *Eq. Ca. Abr.* 258. 2, 474. avoided for fraud, and aided when defective, *Com. Dig.* Chancery (3 N.) and 1 *Veſ.* 289. See further how fines may be avoided, or reverſed, and by whom, *Com. Dig.* Fine. (H.) Pleader (3 B. 9.) *Vin. Abr.* Fine (D. 11.) and *Bac. Abr.* Fines (H.)

(3) For a deſcription of the nature and operation of *deeds to lead or declare the uſes of a fine*, and ſome general rules and obſervations concerning them, ſee *Chet.* 84. *ſtat.* 4 & 5 *Ann. c.* 16. §. 15. 2 *Bl. Com.* 363. *Bac. Abr.* Uſes, and Truſts (E). *poſt* in the chapter on uſes, and *Com. Dig.* Uſes (D).

CHAP. III.

CHAP. III.

Of a Common Recovery.

1. Common recovery. *Quid.*

A Recovery in generall is the obtaining of any thing unjuſtly taken or detained, by judgment or triall of law. And it is either a common recovery, which is ſuch a recovery as is uſed for a common aſſurance of land, or other recovery, which is not uſed as an aſſurance of land. And the common recovery that is uſed for the aſſurance of land is nothing elſe but *fictio juris*, or a certaine forme or courſe ſet down by law to be obſerved, for the better aſſuring of lands and tenements to men. And this is ſomewhat after the example of the recovery upon title, which is without conſent and contrary to the will of him againſt whom the ſame is had: for there is in this a colourable ſuit, wherein there is a demandant which is called the recoverer, and a tenant which is called the recoveree, and one that is called to warrant upon a ſuppoſed warranty which is called the vouchee.

Co. ſuper Lit. 154. See the Preamble of the ſtat. of 23 H. 8. cap. 10. 23 Eliz. cap. 3. Doct. & Stud. 41. Weſt. Symb. tit. Recovery.

Recoveror. Recoveree. Vouchee.

2. *Quotuplex.*

The common recovery is ſometimes with a ſingle voucher; which is, when the writ is brought againſt him that is to paſſe the land, immediately, and he doth vouch over the common vouchee. And ſometimes it is with a double voucher; which is when the writ is brought againſt another, to whom he that is to paſſe the land, hath aliened it, and he doth vouch him that is to make the aſſurance, and he doth vouch over the common vouchee: and this is the ſureſt way, and the ſafeſt kind of recovery.

3. The manner and order of ſuffering a common recovery.

In this formality of a common recovery, the courſe is, that by agreement of the parties a reall action is begun by a writ of entry brought by him that is to have the land aſſured, againſt him that is to make the ſame aſſurance, if it be with a ſingle voucher; or if it be with a double voucher, againſt him to whom he that is to make the aſſurance, hath aliened the land. And in this ſuit, the recoveror that doth bring the action doth ſurmiſe that the tenant againſt whom the writ is brought hath no right to the land, but that the recoveror hath right thereunto, and that the tenant came to it from ſuch a ſtranger whom the demandant doth name: And to this the tenant doth appear in perſon or by atturney, and then doth enter into defence of the land, but in pleading doth vouch to warrant. *i. e.* doth alledge that he bought the land of *I. S.* a ſtranger, who in the conveyance thereof bound himſelf and his heires, to warrant and make good the title to him or them to whom it is conveyed, and thereupon he prayeth that *I. S.* may be called in to defend the title, and then he * is allowed by the court to call in *I. S.* to ſay what he can for the juſtifying of his right to the land before he ſo conveyed it: And hereupon *I. S.* doth appeare and make ſhew as if he would defend the title, but doth pray a further day may be aſſigned him to make his defence; which being granted him by the court, at the day appointed he by agreement, covin, and aſſent of the parties, doth not come in, but make default: And thereupon the land is to be recovered by him that brought the writ againſt the tenant, and he is left for his remedy to *I. S.* upon his warranty, and accordingly judgement is given by the court that the demandant or recoverer ſhall

See the places before. Co. 1. 94. 10. 43. 45.

* P. 38.

recover the land demanded againſt the tenant, and that the tenant ſhall recover ſo much land of *I. S.* (of his own land) in recompence for the land recovered from him which he ought to have warranted and defended but ſuffered to be loſt (1). And this recovery over is called a recovery in value or *pro rata*. But if the recovery be with a double voucher, or a treble voucher, *I. S.* is upon his appearance to call or vouch to warrant *I. D.* and to alledge in the ſame manner as the tenant doth, and ſo pray that *I. D.* may come in, and thereupon *I. D.* doth appear and make default: And ſo if there be more vouchers; and then there muſt be ſeverall recoveries over in value againſt every one of them; but he that is the laſt vouchee is alwaies the common voucher who is one of the cryers of the Court of Common Pleas, a man not worth any thing, and one that hath no land to render in value upon the ſuppoſed warranty. And by this deviſe grounded upon the ſtrict principles of law, the firſt tenant doth willingly let goe the land for the aſſurance of the purchaſor, and yet in truth hath no recompence over, becauſe the vouchee hath no land to render in value. And by this means if one have an eſtate taile in lands which he is deſirous to ſell, or to convert into an eſtate in fee ſimple, the ſame is commonly done; for the tenant in taile doth cauſe the purchaſor or ſome friend of his to bring a writ of entry againſt him for this land, and he appeareth to the writ, and in pleading ſaith that the land came to him or his anceſtors from ſuch a man or his anceſtors who in the conveyance bound themſelves to warrant it. And thereupon that man is called in, who doth appear and make default, and thereupon judgement is had againſt him in manner as aforeſaid. Or if he would have the recovery with a double voucher, then he by fine, feoffment, or deed of bargain and ſale inrolled, diſcontinue the land, and then cauſe the recoveror that is to have the land to bring this writ of entry againſt the diſcontinuee, and he doth vouch the tenant in taile, who doth vouch over the common vouchee, and ſo it is done; and by this the eſtate taile, that the tenant in taile hath or had, is barred and bound, for that it appeareth now he had no power to entaile the land whereunto he had no juſt title, * and beſides he ſhall recover a recompence over in value, and this is adjudged in law to goe in ſucceſſion of eſtate as the land ſhould have done, which is the reaſon why the recovery is a barre to all that are in remainder and reverſion as well as to the iſſues in taile (2).

F.N.B. 134. Co. 9. 6.

Recovery in value or *pro rata, quid.*

* P. 39.

Experientia. And in the ſuffering of theſe recoveries the tenants and vouchees do appear moſt commonly in perſon in court, and ſo the recovery is finiſhed in the court preſently without more doing, but ſometimes they will not or cannot appear in perſon, and then they doe uſe to appear and ſuffer the recovery by atturney. And in that caſe there muſt be a conuſance for a warrant of atturney taken to authorize the atturney or atturneys in this manner if it be for a treble voucher.

Warrant of Atturney.

Weſt. Symb. ubi ſupra. Glouc'ſſ. *Prec'* A. S. & B. *uxori ejus quod juſte &c. redd'* C. D. *Manerium de* N. *cum pertinen' &c. quæ clam' eſſe jus &*

(1) And this agreeably to the doctrine of warranty. 2 *Bl. Com.* 358. 3 *Vol.* 193.

(2) The true reaſon why remainders and reverſions are barred, is ſaid to be, that the recoveror is, by ſuppoſition of law, in of the eſtate tail, and that the eſtate tail by the like ſuppoſition of law continues for ever. *Pig.* 14. ſee further *Vin. Abr.* Recovery Common (A). *Plowd.* 514. *Bac. Law Tracts.* 149. *Com. Dig.* Eſtates (B. 27).

hered' ſuam & in quæ iidem A. *et* B. *non habent ingreſſ. niſi poſt diſſeiſinam quam* H. H. *injuſte & ſine judicio fecit præfat'* C. *infra* 30. *Annos jam ultim' elapſos &c. ut dic' &c.*

Glouc'ſſ. A. S. & B. *po. lo. ſuo* W. W. & R. R. *attornat. ſuos conjunctim & diviſim verſus* C. D. *de placito terræ.*

Glouc'ſſ. M. M. *gen. quem* A. S. & B. *vocant ad warrant', po. lo. ſuo* I. I. & L. L. *attornat' ſuos conjunctim & diviſim verſus* C. D. *de placito terræ.*

Glouc'ſſ. G. W. *gen. quem* M. M. *voc. inde ad warrant', po. lo. ſuo* R. G. & R. S. *attornat' ſuos conjunctim & diviſim verſus* C. D. *de placito terræ.*

And in theſe caſes to make two atturneys at the leaſt, and to give them an authority joyntly and ſeverally, that if one of them die before the recovery be ſuffered, the other may have power to doe and diſpatch it. And theſe warrants of atturney for the ſuffering of recoveries are to be acknowledged and certified in the ſame manner as the conuſances of fines acknowledged in the country are, ſave onely that recogniſances for warrants of atturney for recoveries may be taken by any judge of the Court of Common Pleas or any Serjeant at law without a *Dedimus Poteſtatem* (1). But if any others take it, they uſe to doe it by a ſpeciall *Dedimus Poteſtatem*, which is to command the commiſſioners therein named to come to ſuch perſons, and to take the names of their atturney or atturneys in the ſuit, and to certifie the ſame into the chancery under their ſeales ſuch a day. And if there be any woman covert that is to make the conuſance, it ſeems ſhe is to be examined, as in the caſe of the conuſance of a fine (2). And when this is done, the recoveries may be ſuffered by the atturneyes without the perſonall appearance of the parties. And this is as good a recovery as the other which is ſuffered by the perſons themſelves appearing in court, but that it will require longer time for the perfection of it; for in this * caſe there muſt goe forth a *Summoneas ad warran'* which muſt have nine returns ere the recovery can be perfected, and by that time one of the parties may be dead (3). And when the recovery is thus ſuffered by the parties in perſon or by their atturneys, the ſame is to be entred by ſome one of the clarks of the Court of Common Pleas upon the rolles of the ſame court there to remain upon record. And herein there muſt go forth a writ of execution called an *Habere facias ſeiſinam*, which is ſent to the ſheriffe of the county where the land doth lie to put the recoveror in poſſeſſion of the land; (except the recovery be of a reverſion of land after a leaſe for years of it, in which caſe the reverſion ſhall be in the recoverors by a claime without any writ.) And this writ the ſheriffe doth return as executed according to the contents thereof, albeit in truth he never doe any thing upon it.

Co. 10. 43. Co. 1. 94.

Dedimus Poteſtatem.

Examination.

* P. 40.

Habere facias ſeiſinam.

(1) At common law a recovery could not be ſuffered by *de. po.* For the ſtatute of *Carliſle*, 15 *Ed.* 2. firſt gave the dedimus. *T. Raym.* 71.

(2) The examination is now totally diſuſed according to *Pig.* 66, but it is otherwiſe according to the editor of the ſecond edition of that book, feme coverts being examined by the ſerjeants at the bar when they come to ſuffer recoveries. See the caſe of *Stokes* v. *Oliver*. 5 *Mod.* 209. where feme covert vouchee was under age and *appeared by attorney* and the recovery reverſed after ſhe came of age: if ſhe had vouched in perſon or by guardian, the recovery ſhould not have been reverſed *for error* after full age.

(3) Abridged to five returns by Stat. 16 *Car.* 1. *c.* 6. §. 10. See 1 *Lev.* 130, *Winne* v. *Lloyd*, where the warrant of attorney was teſted before the ſummons *ad warrantizandum*, and on a writ of error, the recovery held good.

And

And after this all the ſame proceeding is to be exemplified by the clarke of the ſame court (1).

Co. 5. 41. 10. 37. 39. 3. 5. 6. 41. 42. Doct. & Stud. 41. 49. 50. ſtat. 13 Eliz. cap. 5 33. ca. 3. 7. H. 8. cap. 4.

A recovery being matter of record is much of the nature of a fine, and ſuch a thing as whereof the law taketh notice; for it is now become a formall and orderly manner of aſſurance of lands and one of the common aſſurances of the kingdome, or a common way and means to paſſe land from one to another (2); And therefore if a tenant for life ſuffer ſuch a recovery of his land it is a forfeiture of his eſtate; an uſe may be averred upon it as well as upon a fine; and it may be avoyded for covin as well as any other kind of conveyance. But it is of ſpeciall uſe and hath a ſpeciall virtue to bar and binde eſtates in taile and all the remainders and reverſions thereupon (3). And becauſe many of the inheritances of the kingdome doe depend upon this aſſurance, and it is oft times the greateſt ſecurity purchaſors have for their money, therefore it hath much favour from the law at this day. And therefore the law will not endure it ſhall be diſputed againſt, for *Communis error facit jus*. And hence it is that it ſhall not be avoided for ſmall errors, for it is another rule of law, *Conſenſus tollit errorem*. And if a recovery be ſuffered by a tenant in taile, hereby he hath not onely diſcontinued, barred and deſtroyed the eſtate taile, and ſo defeated himſelf and his iſſues, the former owner of the land, and all the remainders and reverſions thereupon that ſhould take place after the eſtate taile, whether they be in *eſſe* or contingent onely, but alſo all former eſtates, leaſes and charges made by him in remainder or reverſion (4). for as when the eſtate taile in poſſeſſion is not barred by a recovery, the eſtates in reverſion or remainder are not barred, for *Quod non in magis propinquo non in magis remoto valebit*; ſo it is *e converſo*, where the eſtate taile in poſſeſſion is barred by the recovery, all the remainders and the reverſions, conditions, charges, incumbrances and eſtates dependent upon it are barred alſo (5), except it be * in ſome ſpeciall caſes where the remainder or reverſion is in the King. And therefore if *A.* be tenant in taile, the remainder to *B.* in taile, the remainder to *C.* in fee, and *B.* or *C.* doth make a leaſe for years of the land, or grant a rent charge out of the land, or enter into a ſtatute, or the like, or grant the remainder or reverſion upon condition; and after *A.* doth ſuffer a common recovery of the land, and after dieth without iſſue, in this caſe the recoveror ſhall hold the land diſcharged of all theſe eſtates and charges in remainder. But otherwiſe it is if *A.* himſelf make a leaſe, or enter into a ſtatute, and then ſuffer a common recovery of the land, in this caſe this recovery doth

4. The uſe, nature and operation of it.

Forfeiture, Averment. Covin.

* P. 41.

(1) The learned author of the commentaries in 2 *Vol. p.* 361. propoſes ſeveral methods for ſhortening the proceſs of a recovery; one of which is, "to empower the tenant in tail to bar the eſtate tail by a ſolemn deed "to be made in term time and inrolled in ſome court of record." A deed ſo made with ſolemnity would obviate the doubt of the 1 Ld. Keeper in 1 *Pr. Wms.* 91.

(2) And ſupported by the judges, and the court of C. B. will amend miſtakes in entering up recoveries, 5 *Co.* 45. *Pig.* 170. See fully as to the origin, nature, and uſe of a common recovery, *Pig.* 8. 2 *Bl. Com.* 117, 357. 1 *Burr.* 115.

(3) And the power of *ſuffering a common recovery* is a privilege *inſeparably incident* to an eſtate tail, and cannot, be reſtrained by condition, limitation, cuſtom, recognizance, ſtatute, or covenant. 1 *Burr.* 84.

(4) See accordingly and the reaſon, *Pig.* 118. but tho' a commom recovery bars a contingent remainder, by deſtroying the particular precedent eſtate which ſupported it, yet it bars not an executory device, nor a ſpringing uſe. *Pig.* 127. if the remainder be in abeyance, a common recovery will bar it. 6 *Co.* 42. *a.* a term limited to commence on failure of iſſue, may be barred by a recovery. 1 *Lev.* 35.

(5) Becauſe the law conſiders the conveyance by common recovery in the nature of a real action, and the recoveror is in by right; but it will not bar a mortgage, becauſe that is to be conſidered as a charge upon the eſtate, and cannot be defeated. per Ld. *Hardwicke.* 2 *Atk.* 591.

not

not avoyd but affirme the leaſe or charge, for whereas it was before avoydable by the iſſue in taile or him in remainder or reverſion, now it is good againſt them all, and the recoveror alſo ſhall hold it charged and ſubject to the leaſe and charge of the tenant in taile. This kind of aſſurance therefore is in ſome reſpects better than a fine, for a fine will barre the heire in taile, but not him that is in the remainder, or reverſion; but a recovery will barre them all.

5. What ſhall be ſaid a good common recovery. And who ſhall be barred and bound thereby, or not.

In every good and binding common recovery theſe things are requiſite. 1. That there be a demandant, a tenant, and a vouchee, as the efficient cauſes thereof; for if either of theſe be wanting it is not a compleat recovery. And therefore if a common recovery be had againſt the tenant in taile without a voucher, this is voyd. And for this it is to be known that ſuch perſons and by ſuch names may be demandants, tenants, and vouchees in recoveries, as may be cogniſors and cogniſees in fines. Infant. [a] And therefore a recovery ſuffered by an infant appearing by his guardian is good, and will bind him and all others (1). Woman covert. [b] So alſo a recovery had againſt a woman that hath a huſband being joined with her huſband will bind her and all others. 2. That there be land demanded as the matter, and that the thing be demandable. And for this it is to be known that of ſuch things and by ſuch names as a writ of covenant for the levying of a fine may be had, a writ of entry for the ſuffering of a recovery may be had, ſave only it may not be *de foſſato, ſtagno, piſcaria, un' carucat' terræ, eſtoveriis, homag' fidelitat', de ſervitiis faciendis, de bovata terræ, demariſc', de ſcelion' terræ, de gardino, cottagio, crofto, vergata terræ, fodina, minera, mercatu, nec de ſuperiori camera.* And yet of ſome of theſe alſo it may be by other names. Alſo a recovery may be had of a rent, common, advowſon, franchiſes, and the like, but not of an annuity (2). 3. That it be had and ſuffered in that order and form as law requireth, *viz.* that there be a writ of entry brought, and appearance of the tenant *in fait*, a voucher, and an appearance of the tenant in law the vouchee, judgment and execution in manner as aforeſaid; for if there be any ſubſtantiall defect in theſe things the recovery may be thereby * avoided by writ of error; but if it be onely in forme it will not hurt. 4. That there be a lawfull tenant to the precipe. *i. e.* that the writ of entrie be brought againſt one that at the time of the writ brought is tenant of the freehold, either by right, *i. e.* that hath an eſtate for life at leaſt in the land, or by wrong, *i. e.* that is a diſſeiſor of the land demanded and whereof the recovery is had (3). And therefore in this caſe the courſe is where the land to be recovered is in poſſeſſion, and a fine and a recovery is had of it

* P. 42.

West Symb. ubi ſupra. Co. ſuper Lit. 372.

a Benet's caſe. Hobart's Rep. 275. Paſc. 9. Jac. Earl of Newport's caſe adjudged.

b Co. 10. 43. Plow. 515. 2) Doct. & ſtud. 52. Co. 5. 40, 41. West. ubi ſupra.

Co. 3. 3 ſtat. 23 Eliz. c. 3.

Dyer 252. Co. ſuper Lit. 46. 3. 6.

Co. 3. 6. ſuper Lit. 46. Lit. Sect. 519. Plow. 514. Doct. & Stud. 49. See infra.

(1) As to recoveries ſuffered by infants, ſee *Pig.* 64, and further in *Vin. Abr.* Recovery common (D). *Com. Dig.* Enfant, (B 2). in what caſes equity will decree infant truſtees to join in a recovery, 1 *Pr. Wms.* 536. 3 *Atk.* 559.

(2). A common recovery in the common pleas of *copyhold lands* will not paſs them, but if lands are cuſtomary freeholds, and paſs by ſurrender in a borough court, a recovery in C. B. of ſuch lands will be good. *Oliver* v. *Taylor*, 1 *Atk.* 474. but ſee *contra* the opinion of *Willes* Chief Juſtice, in the caſe of *Carr* v. *Singer* in 2 *Veſ.* 603. Recovery may be ſuffered of a truſt eſtate (by *ceſtuique truſt*) as effectually as it may of a legal eſtate. ſee 1 *Pr. Wms.* 91. 9 *Mod.* 143. ſee further, of what things a recovery may be ſuffered, *Vin. Abr.* Recovery (S).

(3) Otherwiſe the recovery is void according to *Pig.* 28, but if there is no tenant the recovery is good againſt the party who ſuffered it, by way of eſtoppell, tho' not againſt remainder men or ſtrangers. 10 *Mod.* 45. Tenant to the precipe may be made either by fine, feoffment, leaſe and releaſe, or by bargain and ſale inrolled. *Wilſ.* 281. ſee further *Vin. Abr.* Recovery (U). *Com. Dig.* Recovery (B. 3.) as to the doctrine of tenant to the precipe by diſſeiſin, ſee the caſes of *Taylor* v. *Horde*, 1 *Burr.* 60, and *Goodtitle* v. Duke of *Chandos* in 2 *Burr.* 1065.

together, the fine is ſued out firſt, for this doth make the conuſee tenant of the freehold of the land, and then the recovery is had againſt him (1). And when the recovery is to be had of a reverſion, and that there is an eſtate for life in being of the land whereof the recovery is to be had (for an eſtate for years or any ſuch like eſtate will not hinder the ſuffering of a recovery) there the courſe is to get a conditionall ſurrender from the tenant for life of his eſtate to him in reverſion or remainder, to the end that he may be perfect tenant of the inheritance, and then the writ of entry may be brought and the recovery had againſt him (2): for if a writ of entry be brought againſt a ſtranger, and he vouch the tenant in taile in poſſeſſion of the land, and ſo a recovery is had, or if there be tenant for life of land, the remainder or reverſion to another in taile, or in fee, and a ſtranger doth bring a writ of entry againſt him in the remainder or reverſion, or againſt a ſtranger who doth vouch him, and ſo a recovery is had; theſe recoveries are not good. And yet if the writ be brought againſt the tenant of the land and a ſtranger that had nothing in the land together, and ſo a recovery be had; this recovery is good enough. And if a diſſeiſor make a gift in taile of the land to another, and the writ is brought againſt him, and he vouch the diſſeiſee, and he vouch the common vouchee; this is a good recovery. 5. That it be in ſuch a caſe as is not prohibited by ſome ſtatute law (3): for if the King give any of his own land whereof he is ſeiſed, or cauſe or procure another in conſideration of money or other land to give the lands whereof he is ſeiſed, in taile to any of his ſubjects or ſervants in recompence of their ſervice, or the like, the remainder to the King in fee ſimple, or fee taile; ſuch eſtates in taile cannot be barred by a common recovery: And therefore if ſuch a tenant in taile ſhall ſuffer a recovery of ſuch land it is void, and it will neither barre the iſſues in taile, nor any of them in remainder, nor the King (4). But if the King make ſuch a gift in taile keeping the reverſion to himſelfe, and after doth grant the reverſion to another; in this caſe the tenant in taile may ſuffer a recovery and barre the eſtate taile and the

Stat. 34 H. 8. c. 20. Co. ſuper Lit. 371. 251. 6. Co. 8. 77. 78.

Prerogative.

(1) Tenant to the precipe made by fine, recovery ſuffered, fine reverſed, yet held a good recovery for there was a tenant at the time. 2 *Salk.* 568. *Lloyd* v. *Evelyn.*

(2) And though the tenant for life keeps the poſſeſſion, yet the recovery will be good. *Pig.* 41. and ſuch ſurrender by tenant for life ſhall be preſumed on a recovery of forty years ſtanding. 2 *Str.* 1129, 1267. ſee further 2 *Burr.* 1069. By the ſtatute of 14 *Geo.* 2. *c.* 20, for amending the law of recoveries, It is enacted, that common recoveries ſuffered without any ſurrender of *leaſes for lives*, or without the concurrence, or any conveyance or aſſurance from any ſuch leſſees, or other perſons claiming under them, in order to make good tenants to the writs of entry, or other writ whereupon ſuch recoveries ſhall be ſuffered, ſhall be as effectual in law, as if ſuch leſſees or other perſons claiming under them, had conveyed or joined in conveying a good eſtate of freehold to the tenants in ſuch writs. *Provided* the perſon or perſons intitled to the firſt eſtate for life, or other greater eſtate (in caſe there be no ſuch eſtate for life in being) in reverſion or remainder, next after the expiration of ſuch leaſes, ſhall convey or aſſure, or join in conveying or aſſuring an eſtate for life at the leaſt, to the tenants in thoſe writs. By this act alſo purchaſers for a valuable conſideration, may, after twenty years from the time of their purchaſe, produce the deeds making tenants, &c. and declaring the uſes of recoveries, as ſufficient evidence of the recoveries, *in caſe no record of the recoveries can be found: Provided* the perſons making the deeds had ſufficient eſtate and power. And by this act alſo common recoveries, ſhall, after the expiration of twenty years from the time of ſuffering them, be deemed valid, if it appears upon the face of ſuch recovery that there was a tenant to the writ, and if the perſons joining in ſuch recovery had ſufficient eſtate and power to ſuffer the ſame, *notwithſtanding the deed or deeds for making the tenant to ſuch writ ſhould be loſt or not appear.* For the operation of this ſtatute. ſee 1 *Burr.* 115.

(3) Or by ſome legal diſability, as attainder, or being an alien, &c. ſee *Pig.* 73. The diſabling ſtatute 11 *H.* 7. *c.* 20. as to recoveries by feme coverts of lands *ex proviſione viri*: 33 *H.* 8. *c.* 31. as to recoveries by tenant for life without the conſent of him in remainder or reverſion: 34 & 35 *H.* 8. *c.* 20. as to recoveries of lands of the gift of the crown: and 14 *Eliz. c.* 8. as to recoveries by covin; are explained in order, and illuſtrated by caſes and determinations under them reſpectively, in *Pig.* 75 to 96.

(4) See the caſes of *Murray* v. *Eyton & Price*, *T. Raym.* 338. and *Neal* v. *Wilding*, 1 *Wilſ. Rep.* 275 and further *Com. Dig.* Eſtates (B. 31). *Vin. Abr.* Recovery (A).

reverſion alſo. And where a ſubject by the King's proviſion doth make ſuch a gift in taile, and then doth grant the remainder to the King for life or yeares onely; in this caſe the eſtate taile, remainders, * and reverſion alſo may be barred by a common recovery. So in other caſes where a ſubject doth make a gift in taile, the remainder to the King in fee; this eſtate taile may be barred by a common recovery. And therefore if there be tenant in taile, the remainder or reverſion in fee to another, and he in remainder or reverſion by deed indented and inrolled, doth bargain and ſell his remainder or reverſion in fee to the King; or if one covenant to ſtand ſeiſed to divers uſes in tail, the remainder to the King in fee, in theſe caſes the eſtates and the reverſion and remainders depending thereupon may be barred by a recovery. So if a man make a gift in taile, the remainder in fee, and he in the remainder doth grant his remainder to another for life, the remainder to the King in fee on condition the eſtate ſhall be voyd upon the tender of 20 *l.* in this caſe the eſtate taile, and the reverſion alſo and condition thereupon may be barred (1). So if the Duke of *Lancaſter* had made a gift in taile, and the reverſion had deſcended to the King; this eſtate taile might have been barred by a recovery. So if Prince *H.* ſon of *H.* 7. had made a gift in tail, the remainder to *H.* 7. in fee, which remainder by the death of *H.* 7. had deſcended to *H.* 8. in this caſe the tenant in tail might have barred the eſtate taile by a recovery (2). And yet if the King make a gift in taile, the remainder in taile, or grant the reverſion in taile; in theſe caſes a common recovery may not be ſuffered to barre the intaile, remainder, or reverſion. And if the huſband for the advancement of his wife in jointure, and the preferment of the heires of their two bodies, make an eſtate in taile to him and his wife and the heirs of their two bodies, and the wife after her huſband's death alone by herſelf or with any other huſband ſuffer a common recovery of the land whereof this eſtate is made; this recovery will not barre the eſtate taile. But if in this caſe the recovery be ſuffered by the heire in taile, or by the heire and his mother together, it is a good recovery. And therefore if *A.* be ſeiſed of land in fee and he make a feoffment in fee, to the intent that the feoffee ſhall reconvey it to him and his wife and the heires males of his body, and this is done accordingly, and they have iſſue a ſonne, and ſhe ſurrender, or make a forfeiture, and he enter and ſuffer a recovery; this is a good recovery and barre to the eſtate taile: or if the writ be brought againſt the mother, and ſhe vouch the heire in taile, and ſo a recovery is had, this recovery will barre the eſtate taile. And howſoever at the common law a recovery againſt a tenant for life with a voucher upon a lawfull warranty and a recovery in value was a barre to him in remainder or reverſion, and there was no remedy in this caſe, yet at this day it otherwiſe (3). And therefore if tenant in taile after poſſibility of iſſue extinct, tenant by the courteſie, or any other tenant for life, doe ſuffer their lands to be recovered from them by * covin and agreement either as immediate tenants or as

* P. 43.

Stat. 11 H. 7. cap. 20. Co. 3. 58. 61. 59.

Stat. 14. Eliz. c. 8. Co. 1. 15. 62. 10. 43. 45. 3. 6.

* P. 44.

(1) See accordingly. 2 *Co.* 52. *a.*
(2) See accordingly. *Co. Lit.* 372. *b.*
(3) See diſtinction between recovery ſuffered againſt tenant for life, upon the ground of its being ſuffered with his conſent, or without; and its different operation in thoſe caſes as to remaindermen and reverſioners; *Co. Lit.* 362. *a.* further as to recovery againſt tenant for life, *Wilſ.* 274.

vouchees upon feigned titles, without the aſſent, and to the prejudice of him in remainder or reverſion; ſuch recoveries are void, and will not barre the remainders or reverſions, but are forfeitures of the eſtates of ſuch tenants for life (1). Inſomuch that if tenant for life be made tenant in fait to the writ, or tenant in law upon the voucher, and ſo a recovery be had, as if tenant for life make a leaſe for years, and the leſſee for years doth make a feoffment in fee, and the feoffee doth ſuffer a common recovery in which the tenant for life is vouched, and he vouched the common vouchee; theſe recoveries will not bind the reverſions or remainders. But there is no proviſion made at this day to preſerve the reverſion or remainder expectant upon an eſtate taile, nor to avoyd a recovery of the tenant for life, where he in the next remainder is agreeing and aſſenting to it. And therefore if there be tenant for life, the remainder to *A.* in taile, the remainder to *B.* in taile, *&c.* with divers remainders over, and the tenant for life doth ſuffer a common recovery, in which he doth vouch *A.* who doth vouch the common vouchee; in this caſe this is a good recovery and doth barre the eſtate taile, the remainders, and reverſion alſo (2). And if one be ſeiſed of land in fee and have two ſonnes, *A.* by his firſt wife, and *B.* and a daughter by his ſecond wife, and he deviſe the land to his wife for her life, the remainder to *B.* his ſonne in taile, and the reverſion of the fee deſcend to *A.* and the writ of entry is brought againſt the tenant for life, and ſhe vouch *B.* and he doth vouch the common vouchee, and ſo a recovery is had without the aſſent of the heire in reverſion; this is a good recovery and a barre to all the eſtates in poſſeſſion, remainder and reverſion. And if a writ of entry be brought againſt the tenant for life, and he make default after default, and then the next in remainder in taile is received, or he pray in aid of him in reverſion or remainder, and then they vouch over, and ſo a recovery is had; this is a good recovery and a barre to all the eſtates in remainder and reverſion. But if the writ of entry be brought againſt the tenant for life and him in the remainder in taile together, and they vouch the common vouchee, and ſo a recovery is had; this will be no good recovery to barre the eſtate taile (3). [a] And if ſpirituall perſons, as Biſhops, Deans, Parſons, and ſuch like, ſuffer a recovery of their eccleſiaſticall lands; ſuch a recovery is voyd and will not bind the ſucceſſor. [b] But if it be not in ſome ſuch prohibited caſe as before, and the recovery be had and ſuffered by and between ſuch perſons, and of ſuch things, and in ſuch a manner as aforeſaid, in ſuch caſes, albeit there be in truth no warranty made upon which the voucher is had, and albeit there be nothing to be recovered in value, for that the vouchee hath no land to recover over in recompence, and albeit that no execution be done in the * life time of the party againſt whom the recovery is had, yet is the ſame regularly a perpetuall barre to the parties againſt whom the ſame is had and their heires, of all the eſtates they have in fee ſimple, fee taile, or for life in them,

Forfeiture.

a See before in fines & Co. ſuper Lit. 44.

b Plow. Manxel's caſe. Co. 10. 373. 1. 94. Plow. 357.

* P. 45.

(1) Tenant for life ſuffers a recovery, and afterwards reverſes it by a writ of error, but the forfeiture ſtill remains, *Skinn.* 74.

(2) But ſee *Pig.* 27, where a recovery with treble voucher is recommended as preferable, wherein the tenant to the precipe ſhould vouch the tenant for life, who ſhould vouch *A*, who ſhould vouch the common vouchee.

(3) Accordingly *Leech* v. *Cole*, *Cro. Eliz.* 670. and *Vin. Abr.* Recovery (D). ſee further as to the doctrine of a *joint* præcipe, *Pig.* 36.

and

and againſt all them in remainder or reverſion, and the remainders and reverſions that are depending upon their eſtates: with this difference; the recovery with the ſingle voucher doth not bar any eſtate but ſuch as the tenant in taile hath in poſſeſſion at the time of the recovery had, ſo that if the tenant in taile be in any other eſtate, as by diſſeiſin, or the conveyance of the diſſeiſor, or the like, this eſtate is not barred. But the recovery with the double voucher doth bind and barre all intereſts, eſtates and titles that the vouchee hath at the time of the entry into the warranty (1). All which is further illuſtrated by the examples following. [c] If the writ of entry be brought againſt the tenant in taile, and he vouch the common vouchee, and ſo a recovery is had; this recovery with a ſingle voucher is a good recovery and a barre to the eſtate taile, if it be then in poſſeſſion and not put to a right, and to all the remainders and reverſions depending thereupon (2). [d] So if lands be given to *A.* in taile the remainder to the right heires of *B.* (*B.* being then living) and the writ of entry is brought againſt the tenant in taile, and he doth vouch over the common vouchee; this is a good recovery, and a barre to the eſtate taile and the remainder alſo. But if the tenant in taile be diſſeiſed, and then ſuffer a recovery with a ſingle voucher; or the diſſeiſor make a new eſtate in taile to the tenant in taile, and then the tenant in taile doth ſuffer a recovery with a ſingle voucher; or if the tenant in taile make a feoffment in fee of land, and then take backe a new eſtate to himſelfe from the diſcontinuee in taile or in fee, and then doth ſuffer a common recovery with a ſingle voucher; by this recovery the entaile is not barred (3). But by a recovery with a double voucher in theſe caſes the eſtate taile is barred. And therefore as where the tenant in taile doth levie a fine, make a feoffment, or bargaine and ſell the land by deed indented and inrolled, and the writ is brought againſt the conuſee, feoffee, or bargainee, and he doth vouch the tenant in taile, and he doth vouch the common vouchee; this doth barre the eſtate taile and the remainders and reverſion depending thereupon: So if in theſe caſes the conuſee, feoffee, or bargainee, doth make a new eſtate in taile to the conuſor, feoffor, or bargainor, or he diſſeiſe the conuſee, feoffee, or bargainee, and then levy a fine, make a feoffment, or bargaine, and ſell to another againſt whom the writ of entry is brought, and he vouch the tenant in taile, and he doth vouch the common vouchee; by this recovery the firſt and ſecond eſtate taile and all the remainders and reverſions depending thereupon are barred. So if lands be given to *I. S.* and the heires males of the body * of his wife engendred, and he hath iſſue a ſonne, and after his wife dyeth, and he diſcontinue, and take an eſtate to him and the heires females of the body of his ſecond wife, and after diſcontinue again and take an eſtate to him and the heires females of his owne body, and after diſcontinue again, and the writ of entry is brought againſt the laſt diſcontinuee, and he

c Co. 3. 5. 10. 37.

d Co. 1. 135. 136 3. 59. 12 E. 4. 19. 13 E. 4. Co. 10. 45.

Co. 3. 5. Plow. in Manxel's caſe 1. 8.

* P. 46.

(1) See accordingly *Bro. Abr.* Taile 32. *Bac. Abr.* Fines and recoveries (C). *Wilſ.* 245.

(2) If tenant in tail covenants to ſtand ſeiſed to the uſe of himſelf for life, with remainder to his ſons in taile, and afterwards ſuffers a recovery (being himſelf tenant to the precipe and vouching over the common vouchee) to other uſes in fee, the uſes on the recovery will be good: for where tenant in tail covenants to ſtand ſeiſed to the uſe of himſelf for life, with remainder to his iſſue in tail, it is void, and will not alter the eſtate tail. *Com. Rep.* 119.

(3) Becauſe a recovery with ſingle voucher bars only ſuch eſtate whereof the tenant in tail was actually ſeiſed in law, and not in right only, at the time when the recovery was ſuffered. *Vin. Abr.* Recovery (C). *Pig.* 115.

doth

doth vouch the tenant in taile, who doth enter into the warranty generally, and voucheth the common vouchee; this is a good recovery and a barre to all the eſtates in tail, and the remainders and reverſions alſo. And if *A.* before the ſtatute of uſes had been tenant in taile, and had made a feoffment in fee to *B.* and he and *B.* had after made a feoffment to *C.* to the uſe of *A.* and his wife and the heires of their two bodies, and then ſhe had died, and after *A.* had entered upon *C.* the feoffee, and made a feoffment to *W.* in fee, againſt whom *I. S.* had brought a writ of entry, and he had vouched *A.* the tenant in taile; this had been a good recovery and a barre to all the
Co. 3. 5. 6. 32. eſtates. And if lands be given to huſband and wife and the heires of the body of the huſband, with remainders over to ſtrangers, and the huſband alone doth diſcontinue the whole land by fine, feoffment, or bargain and ſale indented and inrolled, and the writ of entry is brought againſt the diſcontinuee and he doth vouch the huſband alone without the wife, and the huſband doth vouch the common vouchee, and ſo a recovery is had; this is a good recovery for the whole land and a barre to all the eſtates in taile, and remainder, and reverſion, but not to the eſtate of the wife for her life after the huſband's death. But if lands be given to the huſband and wife and the heires of their two bodies, with remainders over to ſtrangers, and the huſband alone diſcontinue, and the recovery is ſuffered as in the laſt caſe; it ſeems this is no barre to the eſtates in taile, or remainder, or reverſion, for any part of the land. And yet if lands be given to *I. S.* and *I. D.* in taile, and *I. S.* diſcontinue the whole, and the writ of entry is brought againſt the diſcontinuee; and he vouch *I. S.* alone; this is a good recovery for the one half of the land, and a barre to all the eſtates. And if lands be Huſband and wife. given as before, to huſband and wife and the heires of their two bodies, and the writ of entry is brought againſt them both, and they vouch the common vouchee, or the huſband alone doth diſcontinue, and the writ is brought againſt the diſcontinuee, and he vouch the huſband and wife both, and they enter into the warranty and vouch the common vouchee, and ſo the recovery is had; theſe are good recoveries for the whole, and a barre to all the eſtates in taile, and to the eſtate of the woman,
Bro. 37. and to all other eſtates. And where lands are given to a man and his wife and the heires of the body of the wife; or to the wife and the heires of her body, and the writ of entry is brought againſt the huſband and wife, and they vouch * the common * Page 47. vouchee; theſe are good recoveries and will barre the huſbands and wives and the eſtates in taile, remainder, and reverſion.
Plow. 514. And where a man hath land in which his wife hath a jointure, or to which ſhe will have title of dower after his death, if the writ of entry in this caſe be brought againſt them both, and they vouch the common vouchee, and ſo a recovery is had, this recovery will barre them both: But the huſband alone without her cannot barre her of any ſuch eſtate by a recovery, for ſhe
Co. 3. 5. 1. 12 Ed 4. 14. may falſifie and avoid it after his death (1). And if lands be given to husband and wife and the heires of the body of the huſband, and the writ of entry is brought againſt the huſband

(1) Tenant in tail cannot ſuffer a recovery without the concurrence of the jointreſs, where the lands are limited to her, *Taylor* v. *Horde*, 1 *Burr.* 116. ſee alſo 1 *Brown's Parl. Ca.* 69. If a recovery be ſuffered of the *wife's lands, by the huſband and wife*, this is as effectual to bar the right of the wife *by the cuſtom of London*, as a fine at common law. 1 *Rol. Abr.* 556.

alone, and he vouch the common vouchee, and ſo a recovery is had with a ſingle voucher; this is no good recovery for any part of the land, nor barre to any of the eſtates, albeit the huſband do ſurvive the wife (1). And yet if lands be given to two others, and the heires of the body of one of them, the remainder over to a ſtranger, and the writ of entry is brought againſt one of them, and he vouch the common vouchee, and ſo a recovery is had; this is a good recovery and a barre to all the eſtates for the one halfe of the land. If lands be given to *A.* in taile, the remainder to *B.* in taile, the remainder to *C.* in taile, the remainder to *D.* in fee, and *A.* doth make a feoffment in fee, and the writ of entry is brought againſt the feoffee, and he doth vouch *B.* (being him in the ſecond remainder in taile) to warranty, and he doth vouch the common vouchee; this is a good recovery and a barre to the ſecond eſtate taile and all the remainders and reverſion depending thereupon; and yet it is no barre of the firſt eſtate taile which *A.* hath. If the writ of entry be brought againſt a mortgagee, and he doth vouch the common vouchee, and ſo a recovery is had; this is no good recovery to barre or bind the mortgagor, but that he may enter upon the condition broken. So if one give lands to *B.* and his heires, ſo long as *C.* ſhall have heires of his body, and *B.* doth ſuffer a common recovery, and vouch the common vouchee; this is no good recovery to barre the donor of the poſſibility, for in both theſe caſes he that is to be barred hath no remainder or reverſion, but an intereſt or poſſibility which cannot receive a recompence in value. But if in theſe caſes the mortgagee vouch to warranty the mortgagor, or *B.* the donee vouch the donor, and ſo they vouch over the common vouchee, and ſo the recovery is had; theſe will be good recoveries to barre both them and their heirs for ever. And if one have an eſtate in fee ſimple determinable on a limitation or a condition, as if lands be given to *A.* and his heires untill *B.* pay to him 100*l.* and then that it ſhall remain to *B.* and his heires, and *A.* in this caſe doth ſuffer a common recovery and vouch the common vouchee; it ſeems this is no barre to *B.* and his heires, but that upon payment of the 100*l.* he ſhall have the land. So if * one by his will deviſe his land thus, I give unto *A.* my ſonne and his heires for ever my land in *W.* paying 20*l.* to *B.* when *A.* ſhall come to twenty one years of age, and then that *A.* and his heires ſhall have it for ever, and if *A.* ſhall dye without heires of his body, *C.* being then living, that then *C.* ſhall have it to him and his heires for ever, and *A.* pay the 20*l.* to *B.* at his full age, and then ſuffer a recovery of the land, this is no barre to *C.* of his eſtate. But here it muſt be noted, that in the caſes before, where it is ſaid that a recovery is void, it is meant as to the heires and them in reverſion and remainder, for as to the parties themſelves that doe ſuffer the recovery the ſame is for the moſt part good, and doth bind them by way of eſtoppell and concluſion (2). And it muſt be noted alſo that a ſtranger, that hath right to the land at the time of the recovery

Co. 3. 6.

Curia Mic. 18 Jac. B. R. So was it held by moſt of the judges in the caſe between Pell and Brown.

* P. 48.

Co. 3. 5.

(1) Becauſe at the time of the recovery there were no moieties between him and his wife, and the remainder depends upon the intire eſtate, and the huſband was not ſeiſed by force of the tail, and precipe brought againſt him only, ſee *Vin. Abr.* Recovery (D 2). See further as to recoveries ſuffered by baron and feme of the wife's lands, or where they are jointly ſeiſed for life, or in tail, *Com. Dig.* Baron and feme (G 2). *Ca. Temp. Tal.* 164. *Comyns Rep.* 565.

(2) By the Stat. 21 *Jac.* 1. *c.* 26. Perſons levying fines or ſuffering recoveries in the name of any other perſon not privy or conſenting to the ſame, are guilty of felony without benefit of clergy.

ſuffered

ſuffered, is not barred at all by the recovery or by his lacheſs of *non-claime*, &c. as in the caſe of a fine.

Stat. 7 H. 8. cap. 4. Dier 31. Co. ſuper Lit. 104.

6. The remedy of recoverors againſt the leſſees for rents and ſervices and upon waſte done.

The recoverors in common recoveries their heirs and aſſignes ſhall have the like remedy againſt leſſees for lives or years of the land recovered, their executors or aſſignes, by diſtreſſe, avowry, or action of debt, for the rents and ſervices reſerved upon their leaſes that ſhall be due after the ſame recoveries had: And alſo like actions for waſte done after the recovery had; And like remedy upon a diſturbance in a preſentation to an advowſon, and in like manner and forme as the leſſor ſhould or might have had if the ſame recoveries had never been had, albeit the ſame leſſees do never attorn to the ſame recoverors. And if a man make a leaſe for years to begin at Michaelmas reſerving rent, and before Michaelmas he ſuffer a recovery; in this caſe the recoveror ſhall diſtrain for this rent, which the leſſor before the recovery could not diſtrain for. But if the recovery had not been had he might have diſtrained.

Stat. 23 El. cap. 3. Co. 5. 40. 21 H. 8. cap. 15. Co. ſuper Lit. 46. 104. Co. 3. 78. Dier 249. Co. 3. 4. 1. 62. Plow. 515.

7. Where a recovery may be avoided; or not: and by whom; and how.

Fauxifier de recovery.

A recovery may be defeated, fruſtrated and avoided (which is called the falſifying of a recovery) in part, or in all, for many cauſes, as for that there is ſome groſſe and ſubſtantiall error in the manner of the proceeding; but a recovery is not avoidable for falſe or incongruous latine, raſure, enterlining, miſentring of any warrant of atturney, miſreturning or not returning of the ſheriffe, or other want of forme in words, and not in matter of ſubſtance, becauſe it is done by the conſent of the parties. Or it may be avoided, for that he againſt whom the writ of entry is brought is not tenant of the freehold by right or wrong at the time of the writ brought, as when the writ is brought againſt a ſtranger that hath nothing in the land, and he doth vouch the tenant in taile in poſſeſſion of the land. Or a recovery may be avoided, for that he that hath the eſtate and the right is neither party nor privy to the recovery, as when the writ of entry is brought againſt a diſſeiſor, and he vouch a ſtranger that hath nothing in the land, or a recovery is had againſt * the huſband alone of the land whereunto his wife hath title of dower. Or a recovery may be avoided, for that another hath ſome eſtate in the thing whereof the recovery is had at the time of the recovery ſuffered, as when there is a recovery had of land whereof there is a leaſe or eſtate for years, by ſtatute, elegit, or the like. Or it may be avoided, for that the recovery is had by covin, as when it is ſuffered by tenant for life to diſinherit him in reverſion, or when it is gotten by ſome undue practiſe and ſiniſter dealing; for in this caſe it is ſometimes made void by a *vacat* or ſentence of a court. And where a recovery is avoidable or reverſable for any of theſe or ſuch other like cauſes, it muſt be avoided by him whom it doth concern, that is barred and bound by the ſame recovery, that ſhould have had the land if the ſame recovery had not been, and not by any other whom it doth not concern. As if an erroneous recovery be ſuffered by tenant in taile, in this caſe his iſſues, or if they faile, the next in remainder or reverſion ſhall defeat it (1). So alſo if the land be recovered againſt a ſtranger, the tenant in taile ſhall avoid it: And if the land be recovered againſt a diſſeiſor, the diſſeiſee ſhall avoid it: And if the land be recovered againſt him in reverſion or remainder, the

* P. 49.

(1) As to the right of a remainderman to reverſe a recovery erroneouſly ſuffered, and the manner of doing ſo, ſee 1 *Burr.* 410.

tenant for years by ſtatute or elegit ſhall avoid it; but in theſe laſt caſes they ſhall falſifie and avoid it during their particular eſtates only. So alſo the wife ſhall falſifie the recovery ſuffered by her huſband alone as to her title of dower only, and no longer and further. And he in the reverſion or remainder ſhall falſifie and avoid the recovery ſuffered by the tenant for life, either in the life time of the tenant, or afterwards. But neither he in reverſion or remainder, or any one by or under him, or any other, can falſifie a recovery ſuffered by the tenant in taile in poſſeſſion, except it be for ſome ſuch cauſes as before. And the recoveror himſelf cannot falſifie a recovery (1). So neither can a guardian (2); nor a tenant of a manor; as if one hold land of a manor, and a ſtranger recover the manor by a feigned title; a tenant of the manor cannot falſifie this recovery. And in all theſe caſes where a recovery is avoidable and a man hath power given him to falſifie; he muſt doe the ſame ſometimes by writ of error, as in the caſe of an erroneous proceeding; and ſometimes by pleading and the ſetting forth of the ſpeciall matter, as in the caſe where the tenant is not tenant of the freehold, or when the recovery is had by covin againſt the tenant for life, or the like; and ſometimes by the ſhewing and ſetting forth of the practice to the court, and a motion made that a *Vacat* may be made upon the judgement for the cauſes alledged (3).

And thus having done with the common aſſurances that are
* P. 50. made * by matter of record, we come to the common aſſurances that are made by matter of *fait*, *viz.* by deeds and inſtruments of writing in the country; wherein we muſt ſtay a while upon the learning of deeds in generall, and from thence we ſhall deſcend to the particular kinds of deeds (4).

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(1) Where it is ſaid to be a rule, that a party to a recovery ſhall not falſify, it muſt be underſtood with theſe exceptions: 1ſt. If the party can ſhew the recovery was void in law: 2dly, If the recovery was of lands in *D.* and they lie in *C.* or 3dly, if the recovery was on a writ that is abated. *Pig.* 162.

(2) As to reverſal of a common recovery by an infant for nonage, ſee 1 *Mod.* 49. and the numerous references in the margin of that book.

(3) See further by whom and in what manner a recovery may be avoided, *Com. Dig.* Recovery (B 6). *Bac. Abr.* Fines and recoveries (D). *Pig.* 156. *Bro. Abr. tit.* Fauxifier de recovery. *Vin. Abr.* Recovery (A a).

(4) A fine, recovery, and deed to lead the uſes, are all together but one conveyance, tho' they have ſeveral operations. *Pig.* 26. For the doctrine concerning declaring the uſes of a recovery ſee the books referred to at the end of the chapter on fines, and alſo the caſe of *Stapilton* and *Stapilton*. 1 *Atk.* 2.

CHAP. IV.

CHAP. IV.

Of a Deed.

Termes of the law. Co. ſuper Lit. 35.

A Deed is a writing or inſtrument, written on paper or parchment, ſealed and delivered, to prove and teſtifie the agreement of the parties, whoſe deed it is, to the things contained in the deed. 1. A deed. *Quid.*

Terms of the law. Co. ſuper Lit. 229. 143. 38 H. 6. 25.

All deeds are either indented, or poll. The deed indented (which is that which is called an indenture) is when the paper or parchment is cut and indented. And it is defined to be a writing, containing a conveyance, bargain, contract, covenants, or matter of agreement, between two or more; and is indented in the top or ſide anſwerable to another that likewiſe doth comprehend the ſelf ſame matter. And this is ſo called becauſe it is ſo indented; for albeit it be called an indenture, and begin in theſe words, *Hæc indentura, &c.* yet if it be not actually indented, it is no indenture. And on the other ſide, if it be not ſo called, or theſe words be omitted, yet if it be indented, it is an indenture. And this was anciently called *Charta chyrographata vel communis*, becauſe each party had his part (1). The deed poll is that which is plaine without any indenting, when the parchment or paper is polled or cut even. And this was anciently called *charta de una parte* (2). And this is ſingle and but one, which the feoffee, grantee, or leſſee, for the moſt part hath. The deed indented is alſo ſometimes bipartite, *i. e.* of two parts, when there are two parties and two parts of the deed. And then commonly the feoffor, grantor, or leſſor, hath the one part, and the feoffee, grantee, or leſſee, the other part. And ſometimes it is tripartite, *i. e.* when there are three parties and three parts, and then commonly each party hath a part of the indenture. And ſometimes it is quadripartite, *&c.* And according to the parts they doe ſeale interchangeably one to another. And amongſt theſe parts the part ſealed by the feoffor, grantor, or leſſor, is ſaid to be the principall or originall, and the reſt are called but acceſſary, counterparts or copies; and yet all of them in law doe make up but one entire deed. Theſe deeds alſo are ſometimes * in the firſt perſon, as *Noveritis, &c. me* A. B. *&c. dedi & conceſſi &c.* And albeit it be an indenture ſo made, yet it is good enough. And ſometimes they are made in the third perſon, as *Hæc indentura teſtatur, &c. quod idem* A. B. *&c. dedit & conceſſit &c.* † The deed poll is uſually made in the firſt perſon; but if it be made in the third perſon it is good enough. There are divers other diſtinctions of deeds; for ſome are publique that doe concerne countries, ſome of the prince. And ſome are private between particular perſons, and thoſe private perſons or ſubjects. And theſe onely are intended

2. *Quotuplex.* Indenture. Deed poll.

Counterparts.

Lit. Sect. 371. 372.

* P. 51.

† Bro. Oblig. 51. Co. ſuper Lit. 35. 36. Weſt Symb. lib. 1. part 1. Sect. 46.

(1) As to the antient uſe of deeds indented, ſee *Mad. Form. Angl. Differt.* p. 28, and further 2 *Bl. Com.* 295. *Com. Dig. Fait.* (C. 1.)

(2) See diſtinction between *carta* and *factum*, *Co. Lit.* 9. A *charter* doth touch the inheritance, but a *deed* doth not, unleſs it hath ſome other addition. See further note 1. to *Co. Lit.* 96. 13th edition, and *Co. Lit.* 171. b.

here. And of theſe ſome are abſolute, and ſome conditionall: ſome are inrolled, and ſome not inrolled: ſome concern the realty, and ſome the perſonalty: and ſome are mixt. And ſome of theſe alſo contain matter of grant, or gift; amongſt which, feoffments, gifts, bargaines and ſales, grants, and leaſes are the chiefe. And ſome of them containe matter of diſcharge, as releaſes, acquittances, and defeaſances, and ſuch like. And ſome of them contain other matter, as confirmations, and ſuch like. Or, as others diſtinguiſh, ſome of them are conſtitutive and making, and ſome are remiſſory or liberatory. And the firſt ſort are, ſome of them creating, *i. e.* ſuch whereby any eſtate, property, or obligation, not having eſſence before, is newly raiſed and created, as the firſt grant of a rent, common, way, *&c.* eſtate taile, for life, years, *&c.* And ſome of them are conveying, *i. e.* ſuch by which eſtates, properties, and the like being already created, are conveyed to others, as feoffments, bargaines and ſales, grants over or aſſignments, ſurrenders and the like. Thoſe that are of the laſt ſort, are ſuch as do deſcribe and teſtifie ſome precedent contract for a duty or fact, to be paid, performed or done, releaſed or diſcharged; of which ſort are all acquittances, releaſes, and other ſuch like matters of diſcharge.

Note. But here by the way, two things are to be obſerved. 1. That there may be, and are, divers other kinde of deeds beſides thoſe which are named before; for every agreement put in writing, ſealed and delivered, becometh a deed. And atturnments, exchanges, ſurrenders, partitions, authorities, commiſſions, licences, revocations, and the like, are uſually made, given, done and granted by deed. And there are divers other inſtruments concerning merchants and other affaires; if therefore any of theſe be done by deed, ſuch a deed is for the moſt part ſubject to the rules of deeds herein laid down. 2. Albeit that feoffments, gifts, bargains, leaſes, atturnments, exchanges, ſurrenders, and ſuch like things, may in divers caſes be as well made and done without as with a deed, yet if a man will make his claime to any thing given or granted by ſuch feoffment, gift, *&c.* by deed, the deed muſt be ſuch a deed as is a good and perfect deed by the rules herein after laid down. See Weſt. Sym. 1. part.

* P. 52. 3. The parts of a deed. * In every deed or writing there are two parts conſiderable: 1. the externall or materiall part; *i. e.* the parchment or paper, wax and writing: 2. the internall or intellectuall part; *i. e.* the ſenſe, force, virtue and operation of the words and matter therein contained. And in the writing, context or matter contained in divers deeds, as feoffments, grants, leaſes and the like, there are certain formall or orderly parts, which make up the whole, of which the law doth take ſpeciall notice; as, 1. The premiſſes, the office whereof is to rightly ſet down the name of the feoffor, grantor, leſſor, *&c.* feoffee, grantee, leſſee, *&c.* and to comprehend the certainty of the thing granted or leaſed. And herein in ſome deeds there is alſo a recitall of ſome things, and in ſome deeds an exception of ſome part of the thing granted before by the deed. 2. The *Habendum*, the office whereof is to name again the feoffee, leſſee, *&c.* and to ſet forth what eſtate he ſhall have, and for what time he ſhall hold the thing given or granted. 3. There is ſet down and expreſſed upon what terms and conditions the eſtate of the thing granted ſhall be held. And therefore there is ſometimes contained therein a *Tenendum*, to ſet forth by what tenure the Co. ſuper Lit. 6. 229. 2. 3.

grantee ſhall hold the land granted (1). 4. A reſervation or *reddendum*, to ſet forth by what rent he ſhall hold the land. 5. A condition. 6. A warranty. 7. Covenants. 8. The concluſion after this manner, *In cujus rei teſtimonium, &c.* wherein is ſet forth the date of the deed, containing the day, month and year, and the ſtile of the king or year of our Lord. And all theſe are ſometimes contained under the premiſſes and the *Habendum* (2).

Plow. 134. 38H. 6. 24, 25. Lit. Sect. 370. 9 H. 6. 35. 35H. 6. 34.

4. The nature of a deed indented, and a deed poll, with the difference that is between them.

All the parts of a deed indented in judgement of law doe make up but one deed, and every part is of as great force as all the parts together, and they are eſteemed the mutuall deeds of either party, and either party may be bound by either part of the ſame. And the words of the indenture are the words of either party. And albeit they be ſpoken as the words of the one party only, yet they are not his words alone, but may be applied to the other party if they doe more properly belong to him: for every word that is doubtfull ſhall be applied and expounded to be ſpoken by him to whom they will beſt agree according to the intent of the parties; and they ſhall not be taken more ſtrongly againſt one, or beneficially for the other, as the words of a deed poll ſhall. † If therefore *A.* by indenture enfeoffe *B.* upon condition, and then doth enter for the condition broken; in this caſe it hath been held, that *A.* in his pleading may ſhew forth the deed that he himſelfe ſealed, and that this is ſufficient. And therefore alſo it is thought, that an indenture made in the firſt perſon, is as good in law, as an indenture made in the third perſon, when both parties * have to this put their ſeales; for if in an indenture made in the third perſon, or in the firſt perſon, mention be made, that the grantor only hath put his ſeale and not the grantee, then is the indenture only the deed of the grantor; but when mention is made that the grantee alſo hath put his ſeale to the indenture, it ſhall be ſaid to be the deed of them both (3).

† 11 H. 7. 22. per Brian.

Lit. Sect. 373.

* P. 53.

Finche's law 109.

And although both parts of the indenture are but as one deed, yet the part of the grantor is as the principall, and the other is not but a counter-part. And therefore if the leſſor only ſeale and not the leſſee, yet it is as good as if both had ſealed; and if there be any difference between the parts, the counter-part ſhall be made to agree with the principall, and it ſhall be deemed the miſpriſion of the clark.

Plow. 434. 421.

Eſtopell.

This deed is the ſtrongeſt kind of deed of the two; for this worketh an eſtoppell, *i. e.* doth barre and conclude either party to ſay or except any thing againſt any thing contained in it. For if a leaſe be by indenture, both parties are concluded to ſay, that the leſſor had nothing in the land at the time of the leaſe made; ſo that if the leſſor happen to have the land after by purchaſe or deſcent, the leſſee may enter upon him by way of concluſion, and the leſſee by eſtoppell ſhall be forced to pay his rent. But it is otherwiſe of a deed poll, for this is

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(1) The *tenendum* is now of very little uſe, being only inſerted by cuſtom: it was formerly uſed to ſignify the tenure by which the eſtate granted was to be holden, viz. *tenendum per ſervitium militare, in burgagio, in libero ſocagio, &c.* but all theſe being reduced by the ſtatute 12 *Car.* 2. *c.* 24. into free and common ſocage, the tenure is now never ſpecified.

(2) See more fully as to the parts of a deed, *Wood's Inſt.* 224. *Noy's Max.* 54. 2 *Bl. Com.* 298. 1 *Wood* 236.

(3) The indenture in the third perſon is the moſt ſure, becauſe it is moſt commonly uſed. *Co. Lit.* 229. *b.* and where a deed is made between two parties, and one of them doth ſeal and deliver his part, and the other doth not, yet the deed ſo ſealed and delivered is good to charge the perſon ſealing and delivering it. *Cro. Eliz.* 212.

commonly

commonly but of one part, which is ſealed by the feoffor, leſſor, *&c.* only. And this ſhall be expounded to be the ſole deed of the feoffor, leſſor, *&c.* and the words therein contained ſhall be ſaid to be his words, and ſhall bind him only, and be expounded altogether in advantage of the feoffee, leſſee, *&c.* and againſt the feoffor, leſſor, *&c.* and this doth not work any eſtoppell againſt either party (1). But if a deed be indented or poll, and there be therein reciprocall covenants between them from one to another, albeit there be but one part, yet if each of them ſeale it and deliver it the one to the other, this is good for both parties; and each of them, that can get the deed into his hand to ſhew or plead, may take advantage thereof againſt the other. And in this caſe the deed is uſually kept by one indifferent between them both. Trin. 38 El. Co. B. per Curiam. Co. ſuper Lit. 143.

5. When and where a deed ſhall be ſaid to be good and ſufficient. And when and where not, but void or voidable *ab initio*.

Note here firſt of all, that ſome deeds are void from the beginning, and do never take effect; and amongſt theſe ſome are abſolutely void againſt all perſons, and ſome are void only to ſome purpoſes, and againſt ſome perſons. Some alſo that are not void from the beginning are, notwithſtanding, voidable, and that ſometimes by the party himſelf that made them, or any others, and ſometimes by others, and not by himſelfe. And ſome deeds are good in their firſt creation and well made at the firſt, but become void by ſome matter *ex poſt facto* (2). And this may be either by an extrajudiciall act, as raſure, or the like, or by a judiciall * act, *i. e.* when by the ſentence of a court a deed is damned and made void, which is called a vacat of the deed. See grant infra.

* P. 54.

A vacat of a deed.

Things requiſite to make a deed good.

To the making of every good deed containing any agreement, theſe things are requiſite. 1. Writing: *i. e.* That it be written in parchment or paper; and that the agreement be legally and formally ſet down, and be ſufficient in law for the compoſition and frame of the words. And this is called the legall part, the judgement whereof belongeth to the judges of the law. 2. That there be a perſon able to contract, and to be contracted with, and a thing to be contracted for, and that all theſe be ſet down by ſufficient names (3). 3. Reading: *i. e.* That if it be an illiterate man that is to ſeale the deed, and he deſire to heare it read, that it be truly read, or the contents thereof truly declared to him. 4. Sealing: *i. e.* That the deed ſo written, be ſealed by the party or ſome other by his appointment, for a further teſtimony of his conſent thereunto. 5. Delivery: *i. e.* That the deed ſo written and ſealed be delivered by the party or ſome other by his appointment as his deed. And theſe laſt things being matters of fact are to be tryed by jurors. 6. That the ground, foundation, end, and purpoſe of making the deed be good and not againſt the law. Otherwiſe in moſt of theſe caſes the deed is void *ab initio*. Alſo in ſome caſes to perfect the contract, and make the conveyance of the thing intended to be paſſed thereby good, ſome other ceremonies or complements are requiſite, as inrollment, livery of ſeiſin, atturnment; otherwiſe the deed in part at leaſt becometh fruitleſſe and vaine. Co. ſuper Lit. 225. 35. 36. Co. 2. 4. 5. Perk. ſect. 149. 137. See infra. See infra. Perk ſect. 137. &c. See infra.

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(1) *Sed. quære* as to the *feoffor* and *leſſor*. In *Co. Lit* 47. *b.* it is ſaid, if the leaſe be made by deed indented, then are both parties concluded: but if it be by deed poll, the *leſſee* ſhall not be eſtopped to ſay that the leſſor had nothing at the time of the leaſe made; whereby it ſeems to be implied that the *leſſor* ſhall be eſtopped.

(2) And ſome that at the time of making are voidable, may be made good by ſome after act, as if *feoffment by huſband and wife of wife's land rendering rent, the huſband dies, the wife accepts the rent*, this ſhall bind her. 2 *Brownl.* 141. *Cro. Eliz.* 749.

(3) What is a ſufficient name or deſcription of the parties to a deed, ſee *Bac. Abr.* Grant (C).

For a deed may be void, either for that the writing is not in parchment or paper; or being ſo, is not legally and formally drawn; or being ſo, there doth want a perſon able to give, or make, or capable to have, or take, or a thing to be contracted for; or if ſo, for that it is not duly ſealed and delivered; or if ſo, for that it is not truly read at the time of the ſealing and delivery; or if ſo, for that it is made void by ſome ſpeciall law, as being made upon an uſurious contract, by dureſſe, or the like. Or it may at leaſt in part loſe its force afterwards by neglect of inrollment, livery of ſeiſin, or atturnment, in caſes where theſe things are requiſite.

Perk. Sect. 118. Co. ſuper Lit. 171.

1. In reſpect of the writing of it.

Every deed well made muſt be written. *i. e.* The agreement muſt be all written before the ſealing and delivery of it: for if a man ſeale and deliver an empty piece of paper or parchment, albeit he doe therewithall give commandement that an obligation or other matter ſhall be written in it, and this be done accordingly, yet this is no good deed. 2. This writing muſt be in paper or parchment, for if an agreement be written on a piece of wood, linnen, the barke of a tree, a ſtone, or the like, and this be ſealed and delivered; this is no good deed (1). [b] But it may be written in * any language, or in any hand. And therefore it is held that a deed written in French or Latine, and in Text, Court, or Roman hand, is as good as a deed written in Engliſh and in a Secretary hand. [c] And albeit the writing be beſide the lines, or the lines be written crooked, yet this will not hurt the deed. [d] And if there be any alteration, raſure, or enterlining made in any part of the deed before the delivery of it; this will not hurt the deed. But in ſuch caſes it is policy to make a *Memorandum* of it upon the back of the deed, and to give the witneſſes notice of it; for otherwiſe if it be in any place materiall, as in the name of the grantor, grantee, in the limiting of the eſtate, or the like, and eſpecially if it be in a deed poll, the deed is greatly ſuſpicious. 3. The matter written, muſt be legall and orderly for manner and matter. *i. e.* There muſt be words ſufficient to ſet forth the agreement and bind the parties; for a deed may be void and loſe its virtue in all, or part, for repugnancy, incertainty, and divers other matters: (whereof ſee in expoſition of deeds *infra*.) But it is not materiall whether the deed be in the firſt, or in the third perſon ſo as the words be aptly applyed. For if a deed poll be in the third perſon, *viz. Quod preſens ſcriptum teſtatur &c. quod idem* A. *dedit & tradidit, &c.* Or an obligation be in the third perſon, *viz. M[d]. quod I. S. debet I. D. 20l. &c.* theſe are good deeds notwithſtanding the ſtatute of 38 *E.* 3. *cap.* 4. which is meant onely of obligations made beyond the ſeas. So if the words of a deed indented, run in the firſt perſon, it is as good as if it were in the third perſon. Neither is it neceſſary that the Engliſh or Latine, whereby it is made, be true and congruous; for falſe and incongruous Latine or Engliſh ſeldome or never hurteth a deed: for the rules are, *Falſa orthographia non vitiat chartam. Falſa grammatica non vitiat conceſſionem.* Neither is it neceſſary that every deed have all the

2] Co. ſuper Lit. 229. F.N.B. 122. 27 H. 6. 9.

b Co. 2. 3.

* P. 55.

c Perk. Sect. 123.

d Perk. Sect. 155. Co. ſuper Lit. 225.

3] Co. ſuper Lit. 225.

Fitz. Fait. & feoffments, 5. Dyer 6.

Co. 5. 121. 10. 133. See Oblig. Numb. 3.

Co. ſuper Lit. 6.

(1) Wood or ſtone may be more durable, and linnen leſs liable to etazures, but writing on paper or parchment unites in itſelf, more perfectly than any other way, both thoſe deſirable qualities, for there is nothing elſe ſo durable, and at the ſame time ſo little liable to alteration; nothing ſo ſecure from alteration, that is at the ſame time ſo durable.—A deed muſt have the regular ſtamps impoſed on it by the ſeveral ſtatutes for that purpoſe, otherwiſe it cannot be given in evidence. 2 *Bl. Com.* 297.

parts of a deed before ſet down, as premiſſes, *Habendum*, &c. for a deed may be good without *Habendum*, warranty, reſervation, or covenant. And a deed is good, albeit theſe words in the cloſe thereof, *In cujus rei teſtimonium ſigillum meum appoſui*, be omitted; and albeit there be no mention made in the ſame that the deed was ſealed, and delivered; ſo as in truth it be duly ſealed and delivered, and the ſealing and delivery can be proved. Alſo a deed is good; albeit it mention no time or place of date or making, or have a falſe date, *i. e.* be dated at one time and delivered at another; and albeit it have an impoſſible date, as the 30th of *February*, or the like, for antiently until the time of *E.* 2. and *E.* 3. the deeds had no date; becauſe the law was then held to be, that if a deed were dated before the time of memory it was not pleadable, except it were of record, but it might have been given in evidence. But he that doth plead ſuch a deed without any date, or with ſuch an impoſſible date, muſt ſet forth the time when it was delivered (1).

Co. 2. 5. Dyer 19. Kelw. 70.

Co. 2. 5. 5. 117. Dyer 28. Perk. Sect. 120. Co. ſuper Lit. 6.

* P. 56.

2. In reſpect of the perſons parties thereunto and matter therein.

* The ſecond thing required in every well made deed is, that the perſon making it be able to give, grant, make, or doe the thing contained in it; that the perſon to whom it is made be capable of the thing to be given, granted, made or done thereby; for if it be made by, or to any ſuch perſons as are diſabled, as infants, aliens, women covert, perſons attainted of treaſon or felony, idiots, and ſuch like, it will be void in all or part (2). But any perſon naturall, male or female, or politique, as ſole corporations, or corporations aggregate of many, eccleſiaſticall or temporall, not diſabled by law, may give or take by deed. Alſo there muſt be ſome matter, whereabout the contract may be converſant. It is therefore ſaid, that in every grant there muſt be grantor, grantee, and a thing to be granted, and in every obligation an obligor, obligee, and thing to which the obligor is bound; and ſo of feoffments and other deeds.

Co. 11. 73. Plow. 355. Perk. Sect. 1. 119. See Grant. infra. Numb. 4. Feoffement infra. Numb. 12.

3. In reſpect of the reading of it.

The third thing required in every well made deed is, That if the party that is to ſeale it be a blind or an illiterate man, and deſire to heare it read, that it be ſo; for if ſuch a man be to ſeale a deed, and he deſire to heare it, or to heare the contents of it read or declared to him firſt, and it be not done, and he afterwards ſeale and deliver it, this is no good deed. So if upon or without any ſuch requeſt made by him that is to ſeale and deliver it, the party himſelf to whom it is made, or a ſtranger, ſhall read the deed, or declare the contents thereof, falſly and otherwiſe than in truth it is, the deed will be voyd, at leaſt for ſo much as is ſo miſread or miſdeclared. But if the party himſelf that is to ſeale and deliver it, before the ſealing and delivery thereof cauſe another that is a ſtranger covinouſly to read it, or to declare the contents thereof falſly to him, and otherwiſe than it is, of purpoſe to make the deed void, this will not hurt the deed. So if the party that is to ſeale the deed, can read himſelf and doth not, or being an illiterate or a blind man, doth not require to heare the deed read, or the contents thereof declared, in theſe caſes albeit the deed be contrary to his minde, yet it is good and unavoydable.

Co. 2. 9. 11. 27. 14 H. 8. 26.

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(1) See accordingly *Dodſon* v. *Kayes*, *Yelv.* 193. If two deeds bear date the ſame day, and are manifeſtly but one agreement, that ſhall be preſumed to be executed firſt, which ſhall ſupport the clear intent of the parties. *Taylor* v. *Horde*, 1 *Burr.* 106.

(2) *Or voidable*, for deeds executed by infants are ſometimes void, and ſometimes voidable, ſee *Perk.* § 12. *Co. Lit.* 2. *b.* 380. *b.* ante *p.* 7. note 1. *Bac. Abr.* Grant (A. 3). *Com. Dig.* Enfant (C. 2, 3). but deeds by femes covert are ſaid to be always void. *Co. Lit.* 42. *b.* 13th Edit. *note* 4. ſee further as to deeds by or to the ſeveral perſons mentioned in the text. 2 *Bl. Com.* 290. *Vin. Abr.* Faits (F. a). Grants (H. a. 12.) 2 *Atk.* 398.

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Termes of the law. Fait. Co. ſuper Lit. 225. Co. 2. 4. 5. Perk. Sect. 129.

The fourth thing required in every well made deed is, that it be ſealed: but this ſealing of deeds in times paſt was not uſed, for the Saxons uſed only to ſubſcribe their names, and to adde the ſigne of the croſſe, and to ſet down a great number of witneſſes (1). And afterwards the Normans brought in with them the ſealing of deeds but by degrees; for firſt the Kings and a few of the nobility uſed it, and to ſeale with their ſeales of arms; afterwards all the nobility uſed it, and then the gentlemen, and about the time of *E.* 3, all men began to uſe ſealing of deeds, which hath been continued ever ſince, ſo that now it is of neceſſity, in ſo much that if a deed be never ſo well written before and delivered afterwards, yet if it be * not ſealed between the writing and delivery, it is not a good deed. But if a ſtranger ſeale it by the allowance or commandement precedent, or agreement ſubſequent, of him that is to ſeal it, before the delivery of it, it is as well as if the party to the deed did ſeale it himſelfe. And therefore if another man ſeal a deed of mine, and I take it up after it is ſealed and deliver it as my deed; this is ſaid to be a good agreement to, and allowance of the ſealing, and ſo a good deed. And if the party ſeal the deed with any ſeal beſides his own, or with a ſtick, or any ſuch like thing which doth make a print, it is good. And although it be a corporation that doth make the deed, yet they may ſeal with any other ſeal beſides their common ſeal, and the deed never the worſe. And if there be twenty to ſeal one deed, and they ſeal all upon one piece of wax and with one ſeal, yet if they make diſtinct and ſeverall prints; this is a very ſufficient ſealing, and the deed is good enough (2).

4. In reſpect of the ſealing of it.

Perk. Sect. 130, 131, 134.

Perk. Sect. 130. 131. 132.

Perk. Sect. 134.

* P. 57.

Co. 2. 4. 5. Perk. Sect. 137. 9 H. 6. 37.

The fifth thing required in every well made deed is, That there be a delivery of it. And for this it muſt be known, that delivery is either actuall, *i. e.* by doing ſomething and ſaying nothing, or elſe verball, *i. e.* by ſaying ſomething and doing nothing, or it may be by both: And either of theſe may make a good delivery and a perfect deed. But by one or both of theſe it muſt be made; for otherwiſe, albeit it be never ſo well ſealed and written, yet is the deed of no force. And though the party to whom it is made take it to himſelfe, or happen to get it into his hands, yet will it do him no good, nor him that made it any hurt, untill it be delivered. And a deed may be delivered by the party himſelf that doth make it, or by any other by his appointment or authority precedent, or aſſent or agreement ſubſequent, for *omnis ratihabitio mandato æquiparatur*. And when it is delivered by another that hath a good authority and doth purſue it, it is as good a deed, as if it were delivered by the party himſelf: but if he do not purſue his authority, then it is otherwiſe. And therefore if a deed, or the contents thereof, be read or declared to a man that is to ſeal it; and he (being illiterate) doth deliver it to a ſtranger, and bid him examine it; and if it be ſo as it was read to him, then to deliver it as his deed, otherwiſe to redeliver it to him again that made it; in this caſe if the deed be, in truth, otherwiſe than it was read, and yet notwithſtanding he, to whom it was delivered, doth

5. In reſpect of the delivery of it, and what ſhall be ſaid a good delivery, or not.

1. In reſpect of the perſon that doth make it.

Perk Sect. 137. 9 H. 6. 37. Co. 11. 28. 3. 35. 47 E. 3. 3.

(1) And the ſtatute 29 *Car.* 2. *c.* 3. revives the Saxon cuſtom of *ſigning*, and expreſsly directs it in all grants of lands, and many other ſpecies of deeds; in which therefore ſigning ſeems now to be as neceſſary as ſealing, though it has been held ſometimes that the one includes the other. 2 *Bl. Com.* 306.

(2) See further as to the ſealing of deeds, *Com. Dig.* Fait (A. 2). *Roll. Abr.* Fait (H).

deliver it to him, to whom it is made, this delivery ſhall not availe, neither is the deed by this delivery become a good deed (1).

2. In reſpect of him to whom it is made.

And ſo alſo a deed may be delivered to the party himſelf to whom it is made, or to any other by ſufficient authority from him: or it may be delivered to any ſtranger for, and in the behalf, and to the uſe of, him to whom it is made, without authority. But if it be delivered * to a ſtranger without any ſuch declaration, intention, or intimation, unleſſe it be in caſe where it is delivered as an eſcrow, it ſeems this is not a ſufficient delivery. And yet if an obligation be made to the uſe of a third perſon expreſſed by the deed, and the obligor deliver it to him to whoſe uſe it is made; this is ſaid to be a good delivery. And albeit it be delivered before or after the day of the date of it, yet it is good enough: but if it be delivered before it be ſealed it is nothing worth (2). And where it is delivered before the date, yet in the pleading of it, it muſt not be ſo ſet forth.

Dyer 167. Perk. Sect. 137. 8H. 26. Co. ſuper Lit. 36. 3. 26. 5. 119. 10 H. 6. 25. 13 H. 4. 8.

* P. 58.

Dyer 192.

Co. 2. 4. Plow. 492.

3. In reſpect of the time.

4. In reſpect of the manner and order of delivery.

If I have ſealed my deed, and after I deliver it to him to whom it is made, or to ſome other by his appointment, and ſay nothing, this is a good delivery: ſo if I take the deed in my hand and uſe theſe or the like words; here take it, or this will ſerve, or I deliver this as my deed, or I deliver it to you, theſe are good deliveries. So if I make a deed of land to another, and being upon the land, I deliver the deed to him in the name of ſeiſin of the land; this is a good delivery. So if the deed be ſealed and lying in a window, or on a table, and I uſe theſe or the like words, there it is, take it as my deed; this is a good delivery and doth perfect the deed; for as a deed may be delivered by words without deeds, ſo may it alſo be delivered by deeds without words (3). But if a man ſeale and acknowledge before a Major, or other officer appointed for that purpoſe, a writing provided for a ſtatute or a recogniſance, this acknowledgment before ſuch an officer ſhall not amount to a delivery of the deed ſo as to make it a good obligation, if it happen not to be a good ſtatute or recogniſance (4).

Co. 9. 137. Dyer 192. 167. Co. ſuper Lit. 36. 49. 35. Aſſ. pl. 6.

Adjudged Trin. 37. El. B. R.

As an Eſcrow, *Quid.*

The delivery of a deed as an eſcrow is ſaid to be where one doth make and ſeale a deed and deliver it unto a ſtranger untill certain conditions be performed, and then to be delivered to him to whom the deed is made, to take effect as his deed. And ſo a man may deliver a deed, and ſuch a delivery is good. But in this caſe two cautions muſt be heeded. 1. That the form of words uſed in the delivery of a deed in this manner be apt and proper. 2. That the deed be delivered to one that is a ſtranger to it, and not to the party himſelf to whom it is made (5). The words therefore that are uſed in the delivery muſt be after

19 H. 9. Kelw. 88. 14 H. 8. 22. 14H. 6. 42. Perk. Sect. 140. 141. 142. 138. 143. 144. Fits. Feoffments & Fait. 4. 13. 15. Co. 9. 137. ſuper Lit. 48. 36.

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(1) What ſhall be deemed a good delivery, ſee *Vin. Abr.* Fait (I). *Com. Dig.* Fait (A. 3).

(2) A deed takes effect by the delivery, and it is not material whether the delivery be before, or after, the date; if it is delivered before the date, and one of the parties dies before the date, yet the deed is good; for tho' the party is eſtopped to plead the deed to be delivered before the date, yet the jury may ſay the truth. 2 *Co.* 4. *b.*

(3) But if a man throws a writing on a table and ſays nothing, and the party takes it, this does not amount to a delivery, unleſs it be found to have been put there with intent to be delivered to the party. *Ow.* 95. 1 *Leon.* 140. And if a patron draws a preſentation in writing, and puts his ſeal to it, and leaves it in his ſtudy, and the party for whom it is, gets it without the privity or licence of the patron, and brings it to the biſhop, and is thereupon inſtituted and inducted, yet it is all void. *Yelv.* 7.

(4) Debt may be brought upon a ſtatute ſtaple, or merchant; for the words "*obligari et teneri*" make it an obligation, altho' it be not a ſtatute to ſome intent; and by delivery of the party it is an obligation, but not a ſtatute, until the mayor's hand be put to it. *Cro. Eliz.* 356.

(5) See accordingly *Whyddon's* caſe, *Cro Eliz.* 520. ibid. 835, 884.

this

this manner: I deliver this to you as an eſcrow, to deliver to the party as my deed, upon condition that he do deliver to you 20*l.* for me, or upon condition that he deliver up the old bond he hath of mine for the ſame money, or as the caſe is. Or elſe it muſt be thus: I deliver this as an eſcrow to you, to keep untill ſuch a day, *&c.* upon condition that if before this day he to whom the eſcrow is made ſhall pay to me 10*l.* or give to me a horſe, or infeoffe me of the manor of Dale, or perform any other condition, that then you ſhall deliver this eſcrow to him as my deed. For if when I ſhall deliver the deed to the ſtranger, I ſhall uſe theſe * or the like words: I deliver this to you as my deed, and that you ſhall deliver it to the party upon certain conditions: or, I deliver this to you as my deed to deliver to him to whom it is made when he comes to London, in theſe caſes the deed doth take effect preſently, and the party is not bound to perform any of the conditions. So it muſt be delivered to a ſtranger; for if I ſeale my deed and deliver it to the party himſelfe to whom it is made as an eſcrow upon certain conditions, *&c.* in this caſe let the form of the words be what it will, the delivery is abſolute, and the deed ſhall take effect as his deed preſently, and the party is not bound to perform the conditions; for, *In traditionibus chartarum non quod dictum ſed quod factum eſt inſpicitur.* [e] But in the firſt caſes before, where the deed is delivered to a ſtranger, and apt words are uſed in the delivery thereof, it is of no more force untill the conditions be performed, than if I had made it, and layd it by me, and not delivered it at all; and therefore in that caſe albeit the party get it into his hands before the conditions be performed, yet he can make no uſe of it at all, neither will it do him any good. [f] But when the conditions are performed, and the deed is delivered over, then the deed ſhall take as much effect as if it were delivered immediately to the party to whom it is made, [g] and no act of God or man can hinder or prevent this effect then, if the party that doth make it be not at the time of making thereof diſabled to make it. He therefore, that is truſted with the keeping and delivery of ſuch a writing, ought not to deliver it before the conditions be performed; and when the conditions be performed, he ought not to keep it, but to deliver it to the party. For it may be made a queſtion, whether the deed be perfect, before he hath delivered it over to the party according to the authority given him. Howbeit it ſeems the delivery is good, for it is ſaid in this caſe, that if either of the parties to the deed dye before the conditions be performed, and the conditions be after performed, that the deed is good; for there was *traditio inchoata* in the life time of the parties; *& poſtea conſummata exiſtens* by the performance of the conditions, it taketh its effect by the firſt delivery, without any new or ſecond delivery; and the ſecond delivery is but the execution and conſummation of the firſt delivery. And therefore if an infant, or woman covert, deliver a deed as an eſcrow to a ſtranger, and before the conditions are performed, the infant is become of full age, or the woman is become ſole, yet the deed in theſe caſes is not become good. And yet if a diſſeiſee make a deed purporting a leaſe for years, and deliver it to a ſtranger out of the land as an eſcrow, and bid him enter into the land, and deliver it as his deed, and he do ſo, this is a good deed, and a good leaſe, ſo

* P. 59.

[e] Fitz. Faits & Feoffments 13.

[f] Idem.

[g] Co. 3. 35.

Co. 5. 84. 3. 36.

Co. 3. 35. 36.

Relation.

that to ſome purpoſes it hath relation to the time of the firſt delivery, and to ſome purpoſes not (1). See infra at Numb. 8.

* P. 60.
Double delivery.

* In caſe where a deed is meerly void, and doth take no effect by the firſt delivery, as where a woman covert doth ſeale and deliver a deed, or the like, and ſhe after, being ſole, after her huſband's death, doth deliver the deed again, in this caſe the deed is become good. So where a deed originally good, doth become void by matter *ex poſt facto*, as by breaking the ſeal, or the like; if the party to the deed ſeal and deliver it again, by this means the deed is become good again. But regularly there may not be two deliveries of a deed, for where the firſt delivery doth take any effect at all, the ſecond delivery is void. Perk. Sect. 154. 11 H. 6. 27.

[h] And therefore it is held that if an infant, or a man by dureſſe of impriſonment, do make, ſeal, and deliver a deed, *&c.* (in which caſes the deed is not void but voidable) [i] and after the infant being of full age, or the man impriſoned being at large, do deliver this deed again the ſecond time; this ſecond delivery is void: *Debile fundamentum fallit opus* (2). So if a man be diſſeiſed, and make a leaſe for years in writing, and deliver the deed, and after deliver it upon the ground, this ſecond delivery is void, for the firſt delivery made it his deed; but if he had delivered it as an eſcrow, to be delivered as his deed upon the ground, this had been a good ſecond delivery. [h] Perk. Sect. 154. [i] Co. 5. 119. Co. ſuper Lit. 48.

Subſcribing of the parties name or mark not neceſſarie.

And by all this that hath been ſaid it appeareth, that the putting to, or ſubſcribing of the parties name or mark to the deed he is to ſeal, is not eſſentiall; for a deed may be good, albeit the party that doth ſeal it doth never ſet his name or his mark to it, ſo as it be duly ſealed and delivered (3). But it is the beſt and ſureſt way notwithſtanding, to have the name or mark of the party ſubſcribed, for by this means the deed may be the better proved when the witneſſes are dead (4). New. Terms of the law tit. Fait. 9. Jac. Scot's caſe.

Note.

Note here, that albeit a writing or eſcrow, that is not ſealed and delivered in manner as aforeſaid, may not be uſed nor pleaded as a deed, yet it may ſerve and be uſed as an evidence and proof of the agreement contained therein. And whatſoever may be done by word without any writing, may much more and better be done by writing unſealed, or ſealed, though it be not delivered as aforeſaid.

6. In reſpect of the ground and end of it.

And the laſt thing required in every well made deed is, that it have a good foundation, and be to a good end; for albeit a deed have all the qualities of a good deed before required, *viz.* that it be well made, read, ſealed, and delivered, yet it may be void, or at leaſt voidable, for other cauſes; as when it is either unjuſtly gotten and obtained, or corruptly in purſuit and execution of ſome diſhoneſt agreement, or to a diſhoneſt end or purpoſe made. A deed therefore whether it be a feoffment, gift, grant, leaſe, releaſe, confirmation, or obligation, that is made or obtained by *menace* or *dureſſe*, *i. e.* when one doth Co. 2. 9. Perk. Sect. 16 Dyer 143. 45 E. 3. 6.

Menace or *Dureſſe. Quid.*

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(1) See further as to the delivery of a deed as an eſcrow, *Vin. Abr.* Fait (M). (O). 2 *Roll. Abr.* Fait (M).

(2) See accordingly *Bro. Abr.* Faits, *pl.* 28. where the firſt delivery is void, the ſecond ſhall aid it; but if the firſt delivery was *voidable* only, as by an infant, or perſon under dureſs, it ſhall not be made good by a redelivery at full age, or when at large. See further as to double delivery, and in what caſes neceſſary, *Vin. Abr.* Fait (N). *Roll. Abr.* Fait (N).

(3) See ante p. 55. note 1, as to the neceſſity of the deed being ſigned by the party under the ſtat. 29 *Car.* 2. *c.* 3.

(4) With reſpect to the atteſtation of witneſſes to the execution of a deed, ſee 2 *Bl. Com.* 307, 378. 2 *Inſt.* 78.

threaten

threaten another to kill or maim him, if he will * not make him ſuch a deed; or doth impriſon another, until he make him ſuch a deed; and thereupon he make the deed; a deed thus obtained by force, and through fear to avoid danger, is void, and will not bind him that made it, nor availe him to whom it is made. In which matter theſe things muſt be obſerved: 1. That there muſt be ſome threatning of life or member, or of impriſonment; or ſome impriſonment or beating it ſelfe; for if it be onely a threatning to take away goods, or to burn a houſe, or the taking and keeping of a man's goods, or the like, this will not make the deed made upon that occaſion to be *per dureſſe*. 2. It muſt be a threatning, beating, or impriſonment of the party himſelf that doth make the deed, or of his wife; for if it be a threatning, beating or impriſonment of any other beſides the party himſelf that doth make the deed, or his wife, this will not make the deed to be by *dureſſe*. 3. The threatning, beating, or impriſonment, muſt be to this end; and hereupon the deed muſt be made; for otherwiſe the deed ſhall not be ſaid to be by *dureſſe*. As for examples: If foure do threaten one to impriſon him, if he will not ſeale a deed to one of them four, and he do ſo; this deed ſhall be ſaid to be gotten by *dureſſe*, and therefore void. And if one threaten a man to kill him unleſſe he will ſeale a deed to him and three others, and he do ſo; this is void as to all the foure. For if one threaten another to kill or maime him, if he will not ſeale a deed to a ſtranger, and thereupon he do ſo; this is void as if it were to the party himſelf. If one threaten to kill, wound, or impriſon me, to make me ſwear or promiſe to ſeale him ſuch a deed, or impriſon me untill I do ſo; and afterwards at another time and in another place, when I am at liberty, I do it accordingly; this ſhall be ſaid to be made by *dureſſe* and void. If I be in priſon at one man's ſuit, and then another man doth cauſe me to be uſed more ſeverely in priſon, to compell me to make him ſome deed, which I do thereupon make to him; this deed ſhall be ſaid to be gotten by *dureſſe* and therefore void (1).

* P. 61.

Bro. Duteſſe in toto, 9 H. 7. 25. 21 E. 4. 13.

But if I be impriſoned at one man's ſuit, (be the cauſe juſt or not,) and being in priſon I make an obligation or any other deed to a third man; this ſhall not be ſaid to be by *dureſſe*, but is a good deed. So if one threaten me to take away my goods, burn or break my houſe, enter upon my land, kill or wound my father, or mother, brother, or ſiſter, or friend, or do impriſon any of them, and thereupon I ſeale a deed; this is good and ſhall bind me (2). So if one diſtraine my beaſts, to compell me to ſeale a deed, and will not deliver them unleſſe I do ſo, and threaten me that if I take the beaſts again and not ſeale the deed he will kill me, and thereupon I ſeale the deed; this is a good deed and ſhall bind me. If I be arreſted upon

(1) A man cannot plead *non eſt factum* to a deed obtained by dureſs; for it is his deed at the time of the action brought, but he may avoid it by ſpecial pleading with concluſion of judgment, *ſi actio*, 5 *Co.* 119. ſee fully as to the execution of deeds by perſons under dureſs, what deeds may be avoided by them, and how, 2 *Inſt.* 482. *Bac. Abr.* Dureſs, *Vin. Abr.* ſame title, *in toto.* and 1 *Atk.* 409. A deed may be ſet aſide in equity, which has been obtained by *miſrepreſentation*; where there is either *ſuppreſſio veri*, or *ſuggeſtio falſi*, it is a conſtant rule of the court to vacate the deed. 1 *Vern.* 20. and 1 *Pr. Wms.* 240.—In 2 *Pr. Wms.* 270. a diſtinction is taken between a *deed*, and a *will*, obtained from a weak man thro' miſrepreſentation; equity will not vacate the will, that being revocable.

(2) For if he ſhould ſuffer what he is threatened, he has remedy by action, and may recover damages in proportion to the injury done him; 2 *Inſt.* 483. *Perk.* § 18.

good cauſe, and being in priſon, or under arreſt, I make an obligation, feoffment, or any other deed to him at whoſe ſuit I
* P. 62. * am arreſted, for my enlargement and to make him ſatisfaction; this ſhall not be ſaid to be by dureſſe, but is good and ſhall bind me. And therefore if auditors in an account do commit an accomptant to priſon, and then he make an obligation to his maſter for the arrearages, this is good (1). And if one in priſon for felony grant a reverſion of land to another, to help him out of his trouble, this is a good grant (2). If *A.* and *B.* enter into an obligation upon the threatning of *B.* onely, this is a good obligation by *A.* that was not threatned (3).

Eſtoppell. And if one make an obligation by dureſſe, and after being at large take a defeaſance upon it, this makes the obligation good again, and the obligee is concluded to ſay it was by dureſſe. Bro. Defeaſance 17.

Uſury. *Quid.* A deed alſo made upon or in purſuit and execution of an uſurious contract, *i. e.* ſuch a contract, as whereupon the lender is ſure to have in money, or monies worth, for the loane of the thing, above the principall, more then after the rate of 8 *l.* for the 100 *l.* by the year, alſo is void. In which matter theſe caſes are to be obſerved. If one 6. *Decembris* borrow 30 *l.* untill the ſecond day of *June* next following, to pay then for it 33 *l.* for the principall loane, if the ſonne of the obligee be then alive; and if he die before that time, that then he ſhall pay but 27 *l.* which is leſſe than the principall; in this caſe the contract is uſurious and corrupt, and therefore the deed that doth contain it is void (4). Terms of the law. Co. 5. 70. 37 H. 8. chap. 9, 39 El. c. 18. 21 Jac. ch. 17. 13 El. ch. 8.

If one borrow 100 *l.* and for this mortgage land above the value of 8 *l.* by the yeare, on condition that if the mortgagor pay the money at the years end, that the eſtate ſhall ceaſe; this is an uſurious contract, and therefore the deed, whether it be a deed of feoffment, grant, or leaſe containing it, is void (5). So if I lend another man 10 *l.* for a year, and take ſecurity by ſtatute or obligation that the borrower pay me the lender 20 *l.* for it; this contract is uſurious, and therefore the ſtatute and obligation void. But if the agreement and ſtatute or obligation be, that if the borrower pay not the 10 *l.* within the year, that then he ſhall pay 20 *l.* for it; this is no uſury, and therefore in this caſe the deed is good. If one come to me to borrow 500 *l.* of me, and tell me he is unable to pay it together, and therefore he deſires he may pay it in twelve or thirteen years, and doth offer therefore to give me for my kindneſſe 200 *l.* over and above beſides the uſe to let him have it ſo, and then the 500 *l.* the intereſt, and the 200 *l.* is caſt together, and ſo we agree upon an annuity of 80 *l.* *per annum* for fourteen years, which is aſſured by conveyances unto me; in this caſe the contract is uſurious, and all the aſſurances made to perfect it are void. And yet regularly, where the principall money is loſt, the contract Corſlet's caſe. Paſch. 7. Jac. B. R. Curia Hil. 14. Ja. B.R. Saunder's caſe.

(1) Debt upon arrearages of account, defendant ſhewed that before the account, plaintiff of his own wrong did impriſon defendant, and aſſigned auditors to him in priſon, and ſo the account was made by dureſs; plea held good, and judgment accordingly for defendant. 1 *Leon. Rep.* 13.

(2) But this ſhould be *before* conviction; for *after*, the reverſion is forfeited. 1 *Wood* 803.

(3) And it is not avoidable by *A.* tho' it is by *B*; for it is ſaid, that no one ſhall avoid his own bond for the impriſonment or danger of any other than of himſelf. *Cro. Jac.* 187, *Huſcombe* v. *Standing*.

(4) See accordingly the caſe of *Reynolds* v. *Clayton*. *Mo. Rep.* 397. S. C. in 2 *And.* 15. and further in *Vin. Abr.* Uſury (G).

(5) This caſe ſeems to be upon the preſumption that the mortgagee receives the whole profit of the mortgaged premiſes, or ſo much thereof as would exceed 8 *l. per cent per annum*.

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is not uſurious. If a man deſire to borrow of me 100*l.* for a yeare, and I am content to let him have it for the uſe of 8*l.* * but withall I compell him to take a leaſe of me of a houſe at 60*l.* rent, which in truth is worth but 30*l.* this contract is uſurious, and therefore the aſſurances thereupon made, are void. Co. 5. 69. *Et ſic de ſimilibus.* But if a man the 17th of *July* 1579. grant me a rent of 20*l.* *per annum* for the lone of 100*l.* to be paid every half year, and the firſt payment at Chriſtmaſſe 1580. and it is agreed between us, that if he pay the 100*l.* the 17th of *July*, 1580. that then the rent ſhall ceaſe; this contract is not uſurious; and therefore the aſſurances, thereupon made, are not void, but good. But if in this caſe there be a private or collaterall agreement between us, that he ſhall not pay the 100*l.* and redeem the rent, and that clauſe be put in only to evade the ſtatute, then is the contract uſurious notwithſtanding, and the deeds and aſſurances thereof void. *Et ſic de ſimilibus.* If one borrow Hill. 7. Jac. B. R. Curia. 100*l.* after the rate of 8*l.* *per centum*, and the borrower do afterwards pay part of the principall, and all the uſe, within the year; and the lender doth receive it, or the lender doth ſue for his money within the year; theſe ſubſequent acts do not make the contract, or deeds or aſſurances, thereof, void, for it is a rule, that if the originall contract be not uſurious, no matter Bro. Obligation 79. *ex poſt facto* can make it ſo. If one borrow of me 10*l.* and bind himſelf to pay me by a day, and moreover bind himſelf that if he pay it not by the day, that he ſhall pay me 20*l.* for it; this contract, and the deed for perfection of it, are good; and this is not uſurious, for all obligations with conditions, for payment of money lent, are of this nature. And yet if one borrow 100*l.* of me and for this mortgage land to me of a greater value then 8*l.* *per annum*, on condition that if he pay the money at any time before the years end, then the aſſurance to be void; this ſhould ſeem to be an uſurious contract; for in this caſe I am ſure to have by the agreement more than after the rate of Per. Juſt. Brigman, Hill. 7 Car. 1. 8*l.* *per centum*, and ſo it is not in the laſt caſe before (1). If one borrow 100*l.* for a year, and give the broker 20*l.* to procure it; this will not make the contract uſurious, nor the aſſurances void: but for this the broker may be puniſhed (2).

* P. 63.

Alſo all obligations, made to a ſheriffe, contrary to the ſtatute of 23 *H.* 6. ch. 10. are void or at leaſt voidable by pleading. But of this ſee in obligations *infra*.

Obligations made to a ſheriffe contrary to the ſtatute.

Stat. 27 El. ch. 4. Co. ſuper Lit. 3. ſtat. 39 El. ch. 18. A deed alſo made, containing the grant of any thing, with intent and of purpoſe to deceive and defraud one that ſhall afterwards buy the ſame thing, is void. For it is to this purpoſe provided by a ſtatute law, that all fraudulent conveyances of land, or any rent or profit out of land, made by whomſoever, with intent

Colluſion in fraudulent conveyances. 1. To deceive purchaſors.

(1) When the former editions of this book were publiſhed, the rate of intereſt allowed by the ſtatute 21 *Jac.* 1. *c.* 17. was 8*l.* *per cent per annum.* which by the ſtatute 12 *Car.* 2. *c.* 13. was reduced to 6*l.* *per cent.* and by 12 *Ann.* ſtat. 2. *c.* 16. to 5*l.* *per cent.* the utmoſt legal intereſt that can be now taken. See 13th. Edit. *Co. Lit.* 4. a. *Note* 1.—The reaſonableneſs of taking intereſt for the uſe of money, and the advantages ariſing from it to a commercial nation, are explained, in 2 *Bl. Com.* 455. For the doctrine of uſury, what ſhall be deemed ſo, and the puniſhment for it, ſee *Com. Dig. Bac. Abr.* and *Vin. Abr. tit.* Uſury, alſo the caſes of the Earl of Cheſterfield and others v. *Janſſen*, 2 *Veſ.* 125. 1. *Atk.* 301. *Loyd* v. *Williams*, 3 *Wilſ. Rep.* 250. *Murray* v. *Harding*, *ibid.* 390.— *Morriſſet* v. *King*, 2 *Burr.* 891. *Abrahams* and *Bunn.* 4 vol. 2251. At what time intereſt ſhall commence on ſecurities, legacies, *&c.* See *Com. Dig.* Chancery (3. S).

(2) By the ſtatute 12 *Car.* 2. *c.* 13. § 3. (confirmed by 13 *Car.* 2. *c.* 14.) which inflicts a penalty of 20*l.* and impriſonment for half a year on ſcriveners, brokers, and others, who take more procuration money than *five ſhillings for every* 100*l.* for a year. The ſtatute 17 *Geo.* 3. *c.* 26. §. 7. allows brokers to take 10*s.* for the loan of every 100*l.* advanced, as the conſideration for an annuity.

to deceive or defeate any that ſhall purchaſe the land, or any rent or profit out of it, for money, or other good conſideration, of the fruit and effect of their purchaſe, ſhall be void againſt ſuch purchaſors, for ſo much as they buy, and againſt all others that come in by or under them. But all ſuch conveyances as
* P. 64. are * made *bonâ fide* and upon good conſideration, are not to be Co. 3. 31.
accounted fraudulent (1). For the better underſtanding of which ſtatute, and the law in theſe caſes, obſerve, that conveyances *bonâ fide* are oppoſed to ſuch as are upon and with any truſt expreſſe or implied: and good conſiderations are ſet down in the ſtatute to diſtinguiſh from ſuch as are not valuable, as nature, bloud, and the like (2). If one convey land with a preſent or future power of revocation, or alteration, at his will that doth convey it; this ſhall be ſaid a fraudulent conveyance, as againſt him that ſhall afterwards purchaſe this land. So that if Co. 3. 82. 83.
one convey his land to the uſe of himſelf for life, and after to the uſe of divers of his bloud, with a future power, as after the death of *H.* or after ſuch a day to revoke it; and before the day he ſell this land to a ſtranger for a valuable conſideration; in this caſe, the firſt deed ſhall be ſaid to be fraudulent and void, as to him that ſhall purchaſe the land, to do him any hurt (3). And if one convey land with ſuch a power of revocation, and after, with an intent to defraud a purchaſor, make a feoffment to a ſtranger to extinguiſh the power, and after ſell the land for valuable conſideration to a ſtranger; in this caſe both the firſt and the ſecond deed, as to the purchaſor, ſhall be ſaid to be fraudulent, and therefore void. And if there be grandfather, father, Co. 6. 72.
and ſon, and the grandfather makes a leaſe for 100 years to the father, and the father, to prevent the drowning of the leaſe by the deſcent of the reverſion to him, doth aſſigne over the leaſe to certain friends of his, to the uſe of his ſon an infant under pretence to pay debts, the grandfather dieth, the father doth continue the occupation of the land, and maketh eſtates, and doth all acts as owner of the land, the ſon payeth no debts, and the aſſignment (albeit divers perſons of quality were named aſſignes) was delivered to one of the aſſignes of meane eſtate in private, and after the father doth ſell the land for valuable conſideration, in this caſe, this aſſignment ſhall be taken to be fraudulent and void as to the purchaſor. And if the father make a fraudulent conveyance, and after continue the occupation of the land, and it deſcend to the ſon after the father's death, and he ſell it for valuable conſideration; in this caſe, the purchaſor may avoid the conveyance made by the father, as well as if it had been made by the ſon himſelf, and that, whether the ſon be privy to the conveyance made by the father, or not. And if the fraudulent conveyance be made to the King, yet it is void as to a purchaſor, as if it were made to a common perſon. And therefore if there be tenant in taile, the remainder in taile, or in fee, and he in the remainder, perceiving the te-

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(1) Although they are concealed, or were ſecretly made, *Cro. Jac.* 455.

(2) Conſideration of blood, or natural affection, is a *good* conſideration: but not ſuch a good conſideration as is intended by the ſtat. of 27 *Eliz.* for a *valuable* conſideration, as money, marriage, or the like, is the only *good* conſideration within that act, 3 *Co.* 83. *b.* ſee further *Vin. Abr. tit.* Conſideration.

(3) Every voluntary conveyance ſhall *prima facie* be deemed fraudulent as to a purchaſer, 2 *Lev.* 147. 1 *Ca. Ch.* 100. 217: for a conveyance with a power of revocation is in the ſame degree as a conveyance by fraud, *Mo.* 618. ſee further, how a power of revocation ſhall make a deed fraudulent, and how it muſt be reſerved to be executed, to make it ſo, *Com. Dig.* Covin (B. 3).

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nant in tail doth intend to ſell the land, and barre him by a common recovery, doth ſell his remainder by deed inrolled to the King, and after the tenant in taile doth ſell the land by common recovery for good conſideration, in this caſe the * purchaſor ſhall avoid this deed to the King (1); whereby alſo it appeareth, that a fraudulent conveyance within this ſtatute may be by way of bargain and ſale. And ſo was it ruled by the Lord Chiefe Juſtice *Hide* in evidence to a jury at Guildhall, 3 *Car.* 1. And if there be a leaſe for years, and the leſſor make a fraudulent conveyance in fee, and then for good conſideration, maketh another leaſe to begin at the end of the former leaſe; this conveyance ſhall be void, as to the ſecond leſſee. And if *A.* make a leaſe to *B.* for years upon good conſideration, and after he makes another leaſe to *C.* of the ſame thing, for the ſame term, to begin at the ſame time, upon good and valuable conſideration, and *B.* doth not diſcover this, but drives this bargain with *C.* and is witneſſe to this ſecond leaſe, and the firſt leaſe is not excepted in the ſecond leaſe; it ſeems in this caſe the firſt leaſe ſhall be void as to *C.* And in all theſe and ſuch like caſes, albeit the purchaſor before he make his bargain have notice of the fraudulent conveyance, yet ſhall he avoid it as if he were ignorant of it (2). But ſuch conveyances and deeds, made as before, ſhall never be ſaid to be fraudulent and void, as againſt him that, ſhall have the thing afterwards, if he do not give a valuable conſideration for it. And therefore if one make a leaſe, that would be fraudulent and void as to ſuch a purchaſor, to *A.* and after make another leaſe *bonâ fide* to *B.* but without any rent or fine given for it; in this caſe, the firſt leaſe ſhall not be ſaid to be fraudulent, as againſt the ſecond leſſee, and therefore not void. So if one covenant for the advancement of his heirs males, &c. to levy a fine of land by a day, to the uſe of himſelf for life, and after of his iſſue male; and before the day he make a leaſe that is fraudulent for many years, of purpoſe, and after he doth levy a fine accordingly; in this caſe this leaſe is good, and ſhall not be ſaid to be fraudulent and void by this ſtatute, as againſt the iſſue in taile. So if a man that is ſomewhat fooliſh, and given to waſte, be perſwaded to ſettle his lands upon ſome of his friends, of purpoſe to maintain himſelf with it; and after ſome of his lewd companions inveigle him, and get him for a ſmall ſum of money to convey it to them; in this caſe, the conveyance, firſt made, ſhall not be ſaid to be fraudulent, as againſt theſe purchaſors; and therefore it is good againſt them (3). And if one, that hath a term for ſixty years if he live ſo long, make it away, and then he doth forge a leaſe for ninety years abſolutely; and after by indenture, reciting this forged leaſe, for valuable and good conſideration doth bargain and ſell this forged leaſe, and all his intereſt in the land to *I. S.* in

* P. 65.

M. 4 Jac. Cowell & Bart. caſe.

Per 2 Juſt. Hil. 18. Jac B. R.

Co. 5. 60. Co. 3. 83.

Co. ſuper Lit. 3.

(1) As being fraudulent within the ſtatute 27 *Eliz.* the conveyance of the remainder to the king, being with intent to deceive a purchaſor, is directly within the words and purview of that act, 11 *Co.* 74. b.

(2) A purchaſer for a valuable conſideration ſhall hold againſt a prior voluntary ſettlement, though he had *expreſs notice thereof* at the time of his purchaſe; ſuch voluntary ſettlement being made void by 27 *Eliz.* againſt a purchaſer, with, or without notice. *Per Cur. Abr. Eq. Ca.* Notice (C.) *Tomkins* v. *Ennis.* See alſo *Vin. Abr.* Fraud (I.)

(3) And by the ſame ſtatute 27 *Eliz. c.* 4. §. 3. any perſon party or privy to ſuch fraudulent conveyances, who puts the ſame in uſe, and avows the ſame to be made on good conſideration, to the prejudice of the purchaſor, or his heirs, ſhall forfeit one year's value of the lands ſo purchaſed, one moiety to the crown, and the other moiety to the party aggrieved.

this caſe it ſeems that the firſt leaſe is not void, and that the purchaſor ſhall have nothing but the forged leaſe.

2. To deceive creditors and others of debt and ſuch like duties.
* P. 66.

A deed alſo made of any thing with intent and purpoſe to deceive and defeate creditors of their juſt debts and duties, is void alſo as againſt ſuch perſons. For it is provided to this purpoſe * by other ſtatutes, that all feoffments, gifts, grants, alienations, bargains, and conveyances of lands, tenements, hereditaments, goods, and chattells, or any rent, profit, or commodity out of land, made by fraud, or colluſion of truſt, to him that made the ſame, or otherwiſe with intent to hinder and delay, or put off, or put by creditors, or others of their juſt and lawfull actions, ſuits, debts, accompts, damages, penalties, forfeitures, hariots, mortuaries, or reliefes, ſhall be void, as againſt them to whom ſuch things ſhall belong, and he may recover the thing notwithſtanding; but all ſuch as are made *bonâ fide*, and upon good conſideration, are not to be accounted fraudulent by this ſtatute. For the better underſtanding whereof, theſe caſes following are to be heeded. If a man, a little before his death, make a conveyance of his land to his children, or friends of his bloud, with a proviſo to make it void at his pleaſure, and he take the profits of it as his own; or make a conveyance of it to friends, to the intent they ſhall not be ſubject to the payment of his debts, having bound himſelf and his heirs by any eſpecialty, or to the intent that a warranty and aſſets ſhall not bind his ſonne for other land, or the like; in this caſe, this conveyance ſhall be void, as to them that ſhould have relief upon this land by diſcent; and eſpecially when the conveyance is made after the ſuits begun; and more eſpecially when any judgement is had upon the ſuits againſt him that doth make the deed. And ſo alſo is the law for goods. And therefore if one be indebted to *A.* 20*l.* and to *B.* 40*l.* and be poſſeſſed of goods to the value of 20*l.* and *A.* doth ſue the debtor for his 20*l.* and, hanging this ſuit, the debtor ſecretly makes a generall deed of gift of all his chattels real and perſonal to *B.* in ſatisfaction of his debt, and yet doth afterwards continue the occupation, and uſe the goods as his own, and after *A.* getteth judgement and execution; in this caſe, the deed of gift to *B.* ſhall be ſaid to be fraudulent, and therefore void as againſt *A.* So if in this caſe he give all his goods to *B.* in ſatisfaction of his debt, and before any ſuit begun by *A.* with any expreſſe or implicite truſt, as to the intent that *B.* ſhall be favourable to the debtor; or that if the debtor provide the money that he ſhall have the goods again; or that he ſhall ſuffer the debtor to enjoy and uſe the goods and pay him as he can; in theſe, and the like caſes, the deeds ſhall be ſaid to be fraudulent and void, for howſoever it be made upon good conſideration, yet it is not made *bonâ fide*. So if one in conſideration of naturall affection, or for no conſideration, give all his goods to his child, or couſin, *bonâ fide*, this ſhall be a void deed as to the creditors. *Et ſic de ſimilibus.* So if one give all his goods and chattels to his executor in his life time by deed of gift, this ſhall be ſaid to be fraudulent, and ſhall be void as to creditors. And albeit thoſe to whom the deed of fraud is made, know nothing of the fraud, yet is * the deed fraudulent in that caſe alſo, as well as where they are privie to it. If after a commiſſion of bankrupts be ſued out the debtor make a deed of gift of all his goods to one of his creditors in ſatisfaction of his debt; in this caſe this deed ſhall be void, as againſt the reſt of the creditors and

Stat. 3 H. 7. 4. 2 R. 2. ch. 3. 13 El. ch. 5. Co. 3. 82.

Co. 5. 60. 3. 82. Dyer 295.

Co. 3. 80. 83. Bro. Donne. 20. Plow. 54.

* P. 67.

Co. 2. 25.

By the two Judges of Aſſize Aug. 5 Car. in Com. South. Lady Lambert's caſe.

and as to the commiſſioners, and they may order it with the reſt of the eſtate notwithſtanding. But if *A. bonâ fide* and for valuable conſideration mortgage his land, whereof he hath a term of years, to *B.* upon condition that if he repay the money to *B.* a year after, that he ſhall reenter, and *B.* doth covenant with *A.* that he ſhall take the profits of it untill that time, *&c.* *A.* doth not pay the money, and *B.* hoping that he will pay it in time, doth ſuffer him to continue in poſſeſſion and take the profits of it two or three years after, and in the interim judgment is had againſt *A.* upon a bond, and execution awarded; in this caſe execution ſhall not be made of this leaſe; for this deed of mortgage ſhall not be ſaid to be fraudulent as to the creditor: for when a conveyance is not fraudulent at the time of the making of it, it ſhall never be ſaid to be fraudulent for any matter ex *poſt facto* (1).

Mich. 19. Jac. Co. B. Miller & Pot's caſe.

If *A.* be ſeiſed of the fifth part of the manor of *B.* and *B.* of the ſixth part, and *M.* cometh to *A.* to buy his part, and after *M.* ſaith to *A.* my counſell tells me I cannot ſafely buy of you unleſſe *B.* joyn, and after *B.* doth grant a rent charge of 15*l. per annum* out of this manor to *C.* her ſon, and the heires of his body, in conſideration of naturall affection, (and this was about 10 *Jac. C.* being then but about three years old) with proviſo, that if *D.* (whom *B.* did then intend to marry) grant to the ſaid *C.* the like rent of 15*l.* and for the like eſtate, out of 20*l.* land by the year, of the land of *B.* then the ſaid grant to be void, and after the ſaid *A.* bought the 6th. part of the ſaid manor, of *B.* and *D.* her huſband, being intermarried, and after *A. B.* and *D.* her huſband joyn in the grant to *M.* in this caſe it was ruled that this grant to *C.* was not fraudulent and void.

Co. 10. 56, 57.

If one doth hold his land, to pay a heriot at the death of every one that dyeth tenant in fee ſimple, and he infeoffe his ſon and heir in conſideration of naturall affection, and marriage to be had between the ſon and *I.* and the ſon (to prevent the dower of his intended wife during his fathers life) makes a leaſe for forty years unto his father, if his father live ſo long, and afterwards the marriage is had, the father payeth the rent, the ſon doth ſuit of court for the land, and after the father dieth; in this caſe this leaſe ſhall not be ſaid to be fraudulent as to the lord to deceive him of his heriot, becauſe it was made to another end.

Stat. 52 H. 3. c. 9. 34 H. 8. ch. 5. Co. 6. 76. Lit. ſect. 59. Plow. 49, Co. 8. 164. 9. 129.

3. To deceive Lords of their wardſhips, &c.

A deed alſo made to defeat the King or other Lord of his wardſhip ſhall be void, as to a third part of the thing conveyed. And therefore, if any tenant that holdeth of the King, or any * other Lord make a feoffment or other conveyance of his land, to defeat and defraud the King or Lord of his wardſhip, primer ſeiſin, or any other benefit appointed and preſerved for the Lord by the ſtatutes of 32 and 34 *H.* 8. it ſhall be void, as to a third part thereof againſt the King or other Lord, who ſhall notwithſtanding have their wardſhip and other benefits, as if none ſuch were made. As if ſuch a tenant by deed enfeoffe his lineall or collaterall heire within age, or make a leaſe for life the remainder to his heire, or make a gift in taile the remain-

* P. 68.

(1) But if a deed be fraudulent in its creation, yet it may become good by matter *ex poſt facto*; as where a fraudulent feoffment is made, and the feoffee makes a feoffment to another for a valuable conſideration, and the firſt feoffor does afterwards, for a valuable conſideration, make a ſecond feoffment; the feoffee of the feoffee ſhall hold in preference to the ſecond feoffee of the firſt feoffor. 1 *Sid.* 134. *Prodgers v. Langham.*

der in fee to his heire, or make a feoffment on condition that he ſhall reinfeoffe his heire at his full age, or make a feoffment for the payment of his debts, or preferment of his wife and children, or infeoffe another to the intent that he ſhall take the profits till he have an heire male, and then to reinfeoffe him: all theſe are fraudulent and void, as to a third part of the land, and as againſt the King or other Lord, in reſpect of the benefit they are to have of and by the land. But no conveyance in theſe caſes ſhall be ſaid to be fraudulent and ſo void, for two parts of the land. And if one make a feoffment of land to two (whereof his heir is one) and their heires, for money or other valuable conſideration; this ſhall not be ſaid to be a fraudulent conveyance of any part. So if ſuch a joyntenant make a feoffment of his moiety to a ſtranger. † And in caſes where the feoffment is fraudulent for a third part as before, if the feoffee dye or make a feoffment over *bonâ fide* before the death of the anceſtor, in theſe caſes the deed is become good again, and the colluſion gone. If a man for fear of debts convey his lands to friends, with condition that upon payment of 10*l.* they ſhall convey it to thoſe whom he ſhall appoint, in this caſe the conveyance ſhall not be ſaid to be fraudulent as to the King or other Lord, for it was done to another end, and therefore it is a good conveyance againſt all men but the creditors (1). Where deeds ſhall be void in part or in all, for want of inrollment, atturnment, livery of ſeiſin, or the like, ſee afterwards.

† Dyer 2. Co. 2. 94.

Dyer 268. Co. 10. 57.

6. Where a deed good in its creation may become void by matter *ex poſt facto*. And what will make ſuch a deed void or not.

1. By raſure.

If a deed that is well and ſufficiently made in its creation, ſhall be afterwards altered by raſure, interlining, addition, drawing a line through the words (though they be ſtill legible) or by writing new letters upon the old, in any materiall place or part of it, as if it be in a deed of grant, in the name of the grantor, grantee, or in the thing granted, or in the limitation of the eſtate, or if it be in an obligation, when the word [heires] ſhall be inſerted, or the ſumme increaſed, or in the date of either, or the like; be the ſame either by the party himſelf that hath the property of the deed, or any other whomſoever, except it be by him that is bound by the deed, and be the ſame with or without the conſent of him to whom it is made or doth belong, in this caſe, and by either of theſe means, the deed hath loſt its force and is become void (2).

Co. 11. 27. 5. 119. Dyer 59. 261. Perk. Sect. 123. 135. Kelw. 162. Fitz. Releaſe 27. 14 H. 8. 25. Bro. fait 9.

* P. 69.

* And if the alteration be made by the party himſelf that owneth the deed, albeit it be in a place not materiall, and that it tend to the advantage of the other party, and his own diſadvantage, yet the deed is hereby become void. But if the alteration be made by the party himſelf that is bound by the deed in any materiall or immateriall part thereof; or if a ſtranger without the privity or conſent of the owner of the deed ſhall make any ſuch alteration in any part of a deed not materiall; as if it be a deed of a grant containing a leaſe for years, and there be inſerted between [To have and to hold] and [for thirty years] theſe words [from henceforth;] or, if it be an obligation and

(1) Fraudulent conveyances and gifts are only void againſt purchaſers, and creditors, and ſhall bind the parties themſelves and their repreſentatives. *Cro. Jac* 270. See further as to the conſtruction of the ſtatute reſpecting fraudulent conveyances and gifts as to purchaſors and creditors, and the caſes determined under them both in the courts of Law and Equity, in *Bac. Abr.* Fraud (C.) *Com. Dig.* Covin (B. 2.)

(2) *A.* and *B.* ſealed and delivered a bond to *C.* and after, the name and addition of *D.* was interlined, and he alſo ſealed and delivered the obligation, with the conſent of all parties; held to be a good obligation of all three. 2 *Lev.* 35.

there

there be inſerted between [*obligo me*] and [*per preſentes*] theſe words [*et executores meos*] in both which caſes thoſe words are needleſſe and without any fruit at all; hereby the deed is not hurt, but it remaineth good notwithſtanding. But if the alteration be before the delivery of the deed, be it whatſoever, or by whomſoever, it will not hurt the deed. And herein it muſt be obſerved, that then a raſure, *&c.* is moſt dangerous, and the deed thereby moſt ſuſpicious, when it is in a deed poll, and there is but one part of the deed; and when the raſure or other alteration is in any materiall part of the deed; and when the alteration makes to the advantage of him that doth own the deed, and to the diſadvantage of the other that made it; and when there doth appear ſome other thing to be written before; and when there is no other part of the deed, recitall, defeaſance, or other matter to which this may be compared, and that may make it appear to be before the delivery; and when there be other parts of the deed, or other matters whereunto this being compared doth not agree in that part wherein the alteration is; and when the deed hath been in the ſmoke, or any ſuch like means hath been uſed to cover the alteration. And in theſe caſes the matter was anciently uſed to be tried by the judges upon the view of the deed; but it is now uſed to be tried by jurors, whether the raſure, or other alteration, were before the delivery of the deed or not (1).

Perk. Sect. 123. 124. Bro Fait. 6. Perk. 129. 127. 128.

Co. ſuper Lit. 225.

2. By breaking or defacing of the ſeal.

And if after the ſealing, delivery and perfection of a deed, the ſeale thereof happen to be broken off, or to be utterly defaced, ſo that no ſign or print thereof can be ſeen, or it appeareth to have been broken off and it is glued, or the wax new heated and ſet on again, or the labell of the deed hath been broken off from the deed, and is ſewed on again, or the deed is new ſealed with other wax; be the ſame by whatſoever means, or whomſoever, unleſſe it be by him and his means that is bound by the deed; in theſe caſes, and by either of theſe means, the deed is become void. But if any piece of the ſeal remain fixed to the deed, and there be any print left upon that piece, the deed doth continue good. And if after a ſeale of a deed be broken off, the party that ſealed it, do ſeale and deliver * it *de novo*; by this means, it ſeems the deed is become good again (2).

Dier 59. Co. 11. 28. 5. 23. Dyer 212. Perk. Sect. 135. 136. Bro. Oblig. 83.

* P. 70.

3. By redelivery or by cancelling of it.

And if a deed be delivered up to the party that is bound by it to be cancelled and it be ſo; or if he that hath the deed doth by agreement between him and the other cancell the deed; by either of theſe means the deed is become void. But if an obligee deliver up an obligation to be cancelled, and the obligor do not afterwards cancell it, but the obligee happen to get it again into his hands and ſue the obligor upon it, the obligor hath not any plea to avoid it, for the deed remains ſtill in force (3).

Trin. 38 El. Co. B. Dier 112.

(1) When a lawful deed is raſed, whereby it becomes void, the obligor may plead *non eſt factum*; becauſe, at the time of the plea, it is not his deed, 11 *Co.* 27. a. See further in what caſes raſure, or interlining, will vitiate a deed, *Vin. Abr.* Faits (T.) *Com. Dig. Fait* (F. 1.) *Roll. Ab.* S. Faits (T. U.)

(2) It ſeems in a *ſeveral* deed, if the ſeal of one of the parties is broken off, it does not vitiate the deed as to the others, though it is otherwiſe, if the deed was *joint*, *Cro. Eliz.* 408. 2 *Lev.* 220. Upon proof made how the ſeal was broken off, the deed admitted to guide the uſes of a recovery, *Latch* 226.—Where the ſeal is broken off, *non eſt factum* is a good plea, 5 *Co.* 119. b. See further *Com. Dig.* Fait (F. 2.) *Vin. Abr.* Faits (X.)

(3) See accordingly *Cro. Eliz.* 483. and further as to the effect of cancelled deeds at law, where they ſhall be relieved againſt in equity; and what remedy may be had againſt perſons cancelling or deſtroying deeds, *Vin. Abr.* Faits (X. 2. 3. 4). Aſſignment by commiſſioners of bankrupt to three, that being cancelled, and another made to two of them; the cancelling the firſt does not alter the property. 2 *Lev.* 113.

4. By diſagreement.

And if an obligation be delivered as an eſcrow to a ſtranger, to be delivered to the obligee on certain conditions; or to a ſtranger to the uſe of the obligee, and when this is after tendered to the obligee he doth refuſe it and diſagree to it; or if an obligation be made to a feme covert, and her huſband diſagree to it; in all theſe caſes the deed is become void. And like law is of other deeds in divers ſuch like caſes. But the party bound by the deed may not in theſe caſes plead *non eſt factum* to the deed. And in theſe caſes when the party hath once by his agreement made the deed good, he cannot afterwards by his diſagreement make it void: and when once, by refuſall and diſagreement he hath made the deed void, he cannot by agreement or acceptance afterwards make it good.

Co. 3. 26. 5. 119. Dier 5. 167.

Agreement.

5. By judgment of a court.

A deed alſo good in its originall creation may be afterwards damned or avoided by ſentence and order of a court; and this is uſually done in the Starre Chamber, and in the Chancery; and it is when it appeareth that the deed was obtained by ſome fraud, force, circumvention, or ſuch like practiſe, or when it doth appear to be forged, or the like.

Crom. Jur. 29. 40. Bro. Fait 38.

Vacat of a deed.

7. When and where a deed may be good in part and void in part. Or good againſt one perſon and void againſt another, or not.

For the anſwer of this queſtion theſe differences muſt be obſerved. 1. When a deed is void *ab initio*, and when it doth become void by matter *ex poſt facto*. 2. When the deed which is void in part from the beginning, is entire, and when it doth conſiſt of ſeveral clauſes: and when it doth conſiſt of ſeverall clauſes, when the ſeveral clauſes are abſolute and diſtinct, and when they are ſeverall, and yet the one hath dependency upon the other. For if any of the covenants of an indenture, or the conditions of an obligation be againſt law, and the reſt of the covenants or conditions be good and lawfull; in this caſe thoſe that are againſt law, and the deed as to that part, are void *ab initio*; and the reſt, and the deed as for that part, are good *ab initio*. So if three diſtinct obligations are written upon a piece of parchment, and the one of them only is read to the obligor, and he being an illiterate man ſeale and deliver the deed; in this caſe this is a good deed, for that which was read, and void for the reſt *ab initio*. But if an obligation be for 20*l.* and it be read to the obligor an obligation of 20*s.* this is void for the whole *ab initio*.

Co. 11. 27. 14 H. 8. 27. 28. 29.

* Page 71.

* If a deed be read as containing the grant or gift of an eſtate taile, and a letter of atturney to give livery of ſeiſin, and in that ſenſe the party doth ſeale it, and in truth it is a feoffment and conveyance of an eſtate in fee ſimple; in this caſe, albeit the letter of atturney were truly read, yet, becauſe it hath dependence on the eſtate, it is void for all.

Co. 11. 27. Kelw. 70. 3 E. 30 31.

If a man be indebted to me 20*l.* on a contract, and 100*l.* on an obligation, and he pay me this 20*l.* and I am to make a releaſe for it, and the intendment of the releaſe is no more; and it is ſo read to me being an illiterate man, but in truth it is a general releaſe; in this caſe it ſeems it is good for ſo much as it is intended and was declared, and void for the reſt.

Co. 11, 28, Fitz. Feoffments and Faits. 57. 47 E. 3. 3.

If the condition of an obligation be altered by raſure, *&c.* the obligation alſo is hereby become void, becauſe the condition and obligation are one deed; but if the raſure, *&c.* be in the defeaſance of an obligation, this will not make the obligation void.

Dier 27.

If a deed contain divers diſtinct and abſolute covenants, and any of theſe covenants be altered by addition, interlineation, raſure,

14 H. 8. 25, 26. Co. 11. 28.

ſure, or the like, by this means the whole deed, and not that part onely, is become void.

Co. 5. 23. 11. 28. 3 H. 7. 5. If there be divers grantors, obligors, &c. named in a deed, and one of them onely do ſeal the deed, this is a good deed as againſt him that doth ſeal, and void as to all the reſt that do not ſeal. And if divers enter into covenants by a deed ſeverally, and the ſeal of one of them is broken from the deed; in this caſe the deed is good ſtill as to all the reſt, but void as to him. But if an obligation, or the covenants of a deed, be joynt and not ſeveral; or joynt and ſeveral, and the ſeal of one of the obligors or covenanters is broken; or the obligation, or covenants, be altered by raſure or the like; hereby the whole deed is become void.

14 H. 8. 29. Perk. fo. 2. If I be bound in an obligation to a Monk and *I. S.* this deed is void as to the Monk but good as to *I. S.* So if a Monk and I be bound to another; this is good as againſt me, but void as againſt the Monk. And ſo it is in caſe of a grant.

Co. 1. 173. Dier 127. See in Leak's Numb. 13. By a power of revocation, or a condition, a deed may be made void in part and continue in his force for another part. And therefore it ſeems in the uſual caſe where a deed is made upon condition, That if ſuch a thing be or be not done, the deed ſhall be void, or theſe preſents ſhall be void; that in theſe caſes the whole deed and all the covenants therein contained are void: But if the frame of the condition be, that upon ſuch a thing to be, or not to be done, it ſhall be lawful for the feoffor, leſſor, &c. to re-enter, or that the demiſe ſhall be void, without more words; in theſe caſes the eſtate onely, and thoſe covenants that are incident thereunto, as for quiet enjoying and the like, and the deed as to * that part onely is void: and for other covenants that are collateral, and have no dependence upon the eſtate, that part of the deed doth remain in force and is good ſtill; for a man may grant two acres upon condition to re-enter into one of them. If it be intended that the whole deed ſhall be void, the beſt way is to uſe theſe words, [then theſe preſents, and every thing therein contained, ſhall be utterly void.] * P. 72.

Co. 2. 4. 5. 5 H. 7. 26. Plow. 491. Dier 307. 315. Fitz. Feoffments & Fait. 87. 63. 95. All deeds do take effect from, and therefore have relation to, the time, not of their date, but of their delivery: and this is always preſumed to be the time of their date, unleſs the contrary do appear. And hence it is, That if a ſtatute be acknowledged the 26th. day of *May*, and the conuſee make a releaſe of all demands dated the 25th. day, and deliver it the 27th. day; by this releaſe the ſtatute is diſcharged. And that if the defeaſance of a ſtatute do bear date before, and the delivery of it be after, the ſtatute; the conuſor may ſhew this, and take advantage of it in avoidance of the ſtatute. And that if a writing be dated in the minority of an infant, and be ſealed and delivered by him when he is of full age, this is a good deed and will bind him. And that if a releaſe be ſuppoſed to be made by a huſband to barre a duty due to the wife, and it be dated during the coverture, but in truth it is ſealed and delivered by the huſband before the coverture; this ſhall not barre the wife: the time therefore of delivery of a deed is materiall in all theſe and the like caſes, and this is always to be tryed by a jury. And hence it is alſo, that if the next preſentation to a church be granted to two ſeveral perſons, by ſeveral deeds, of ſeveral dates, and the deed that beareth the

8. How and to what time a deed ſhall have relation: and when it ſhall begin to take effect.

Fitz. Feoff. & Faits Barre. 147.

laſt date be firſt delivered; in this caſe, he to whom this deed is made, ſhall have the preſentation, and not the other, whoſe deed albeit it be dated firſt yet is delivered laſt. And hence it is alſo, that if a leaſe be made for years, to begin from henceforth, or *à confectione preſentium*, or *a die confectionis*; this leaſe ſhall be ſaid to begin from the time of the firſt delivery, and not from the time of the date. Co. 5. 2.

Relation.

And where deeds have a kind of double delivery, as in caſe of a delivery as an eſcrow, there they ſhall take effect from, and have relation to, the time of the firſt delivery, or not, *ut res valeat*: for if relation may hurt, and for ſome cauſe make void the deed, (as in ſome caſes it may,) there it ſhall not relate. But if relation may help it, as in caſe where a feme ſole deliver an eſcrow, and before the ſecond delivery ſhe is married, or dyeth, in this caſe, if there were not a relation, the deed would be void, and therefore in this caſe it ſhall relate (1). So if one diſſeiſe me of two acres of land in *D.* and I releaſe to him all my right in my lands in *D.* and deliver it to an eſtranger as an eſcrow, *&c.* until a time, and before that time he diſſeiſe me of another acre there; in this caſe this releaſe ſhall not by relation extend to this other acre to barre me * of that alſo. But as to collateral acts there ſhall be no relation at all in this caſe. And therefore if the obligee releaſe before the ſecond delivery, the releaſe is void, and will not barre the party obligee of the fruit of his obligation (2). Co. 3. 35, 36. 18 H. 6 9. 27 H. 6. 7. Plow. 344.

* P. 73.

9. When and where a deed muſt be ſhewed in court. And how long it ſhall abide there. And who may take advantage of it.

If a man that is party or privy in eſtate or intereſt, or one that doth juſtifie in the right of one that is ſuch a party or privy, ſhall plead a deed in any court; although he claim but parcel of the original eſtate, yet in this caſe, he muſt ſhew the original deed to the court: and the reaſon of this is, to the end that the legal part of the deed (the tryal whereof belongeth to the Judges) may approve it ſelf; *i. e.* that it may be ſeen whether the compoſition of words be ſufficient in law or not; and then that it may appear whether the eſtate be with condition, limitation, or with power of revocation, *&c.* to the end that if there be any ſuch thing in it, and there be no other part of it, the other party may take advantage of it; and then that it may appear to be without raſure, or interlining, and the like; and alſo that it may appear to be well ſealed and delivered, (the tryal whereof doth now belong to the country.) But ſtrangers to eſtate, that are neither parties nor privies, ſhall not be compelled to ſhew the deed, tho they make uſe of it (3). And when a deed is thus ſhewed in court, it muſt remain in that court, all the term wherein it is ſhewed, in the cuſtody of the *cuſtos brevium*; and at the end of the term, if the deed be not denied, the law doth adjudge the poſſeſſion of Co. 10. 92. ſuper Lit. 267, 317, 225. 231, 5. 74. Lit. Sect. 375.

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(1) See accordingly *Jennings* v. *Bragg*, *Cro. Eliz.* 446. So alſo it is of a deed of feoffment, and letter of attorney therein to make livery, by a man *ſanæ memoriæ*, which is delivered by the attorney when the feoffor is *non compos mentis*, yet it is good, becauſe it hath relation to the authority before.

(2) In what caſes ſubſequent acts ſhall bind by reaſon of their relation to precedent ones, ſee *Vin. Abr.* Deeds (O.) Relation (E.) *Com. Dig.* Bargain and Sale (B. 9.) Confirmation (D. 5.)

(3) See fully in what caſes it is neceſſary to ſhew the deed or not, *Com. Dig.* Pleader (O.) (P.) *Wilſ. Rep.* 1 vol. part 1. p. 121. 2 vol. p. 1. *Vin. Abr.* Faits (M. a.) But in caſes of great and notorious extremity, which have occaſioned the deſtruction of the deed, as by caſualty of fire; in that caſe, he who ſuffers ſo great a loſs, may be permitted upon the general iſſue to prove the deed in evidence to the jury by witneſſes, in order that affliction may not be added to affliction. 10 *Co.* 92. b. The evidence on a caſual deſtruction of a deed, is the ſame in a Court of Equity, as in a Court of Law. 1 *Veſ.* 235. In what caſes relief may be had in equity on the deſtruction or loſs of a deed, ſee 1 *Veſ.* 392.

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the deed in him to whom it doth belong. But if the deed be denied, then it is to be kept there until it be determined. Alſo when a deed is ſhewed in court, the adverſe party may take any advantage by it that it will afford him; as if a feoffment be made by deed poll on condition, and the feoffee doth break the condition, and the feoffor doth enter, and the feoffee doth ſue him, and makes his title by that deed, the feoffee may take advantage of the condition.

Dier. 315. 12 H. 6. 1. Co. 2, 4, 5.

10. Where one may ſay his deed was delivered at another time, or in another place.

Any man that hath occaſion to uſe or plead a deed, may ſet forth the delivery thereof to be at any time after the date of the deed; and in ſome caſes he muſt do ſo, if he will have any advantage by it. As if he plead a releaſe to an obligation, and it beareth date before the obligation; in this caſe he muſt averre that it was delivered after, or it will not avail him. But a man may not in pleading ſet forth the delivery of a deed to be before the date of the deed. And yet if it be ſo that a deed be dated after the time of the delivery of it, the deed is good; and therefore if he that doth uſe ſuch a deed do plead and ſet it forth as a deed made before the time of the delivery, and the party that made it plead *Non eſt factum* to the deed, a jury upon the tryal may find the truth of the caſe: but if he by his pleading ſet forth the deed to be delivered before the time of the date, then the jury is concluded as, well * as the party himſelf; for a jury is eſtopped to find any thing contrary to that which is apparently admitted in the record. In debt brought by an executor, the defendant pleaded the releaſe of the teſtator, which did bear date after the death of the teſtator, but he did averre the delivery of it in the life time of the teſtator and the court did not allow of this plea.

Eſtoppell.

* P. 74.

12 H. 6. 1.

Co. ſuper Lit. 6.

Sometimes antiquity added the place where the deeds were made, as *datum apud B.* and this was in diſadvantage of him to whom the deed was made; for if the deed be in general, and without this addition, he may alledge the deed to be made where he will. An obligation made beyond the ſeas may be ſued here in *England* in what place the obligee will, and if it bear date at *Burdeux* in *France*, it may be alledged to be made in *quodam loco vocat. Burdeux* in *France* in *Iſlington* in the county of *Middleſex*, and there it ſhall be tryed: for whether there be ſuch a place in *Iſlington* or not, it is not traverſable in that caſe.

Co. ſuper Lit. 261.

Non eſt factum is an anſwer to a declaration, whereby a man denieth that to be his deed whereupon he is impleaded.

Non eſt factum; *Quid.* And where this may be pleaded to a deed, or not.

If any deed or writing be uſed againſt a man in any court, and it want writing, ſealing, or delivery, or it be not ſealed, written, and delivered as before is ſet forth, the party that is ſued upon it, or againſt whom it is pleaded, may plead this plea to it. So alſo if a deed by any alteration of raſure, *&c.* become void; in this caſe the party may plead this plea to avoid it. So alſo where a deed doth become void or loſe its virtue by the not reading, or not true reading of it to an illiterate man, or by refuſal or diſagreement, as in the caſes before, the party may plead this plea to avoid it. But in all caſes where the deed is voidable, and ſo remaineth at the time of the pleading; as if an infant, or man of full age by dureſs, ſeal and deliver a deed; or if an obligation be well ſealed and delivered by two, and the deed be joint, and the obligee ſue one of them; in theſe and ſuch like caſes, the party bound by the deed may not plead

Non

Non eſt factum; for in the firſt and ſuch like caſes he muſt avoid it by ſpecial pleading, with concluſion of judgment *ſi actio, &c.* and in the laſt he muſt plead in abatement of the writ, *&c.* And if an obligation or any other deed be by any ſpecial act of parliament made void, the party that is bound by it cannot plead this plea of *Non eſt factum* to it; but he muſt avoid it by ſpecial pleading of the matter, and taking advantage of the ſtatute, and ſo with concluſion of judgment *ſi actio, &c.* (1).

And now we come to the expoſition of deeds.

(1) Accordingly 5 *Co.* 119. 11 *Co.* 27. a. ſee further by whom the plea of *non eſt factum* may be had, in what caſes, and at what time, *Vin. Abr.* Faits (N. a.) (N. a. 2.) *Com. Dig.* Pleader (2 W. 18.)

CHAP. V.

CHAP. V.

Expoſition of Deeds.

IT is further to be obſerved, that deeds for the moſt part conſiſt of theſe things, *viz.* the premiſſes, *Habendum*, *Tenendum*, *Reddendum* or reſervation, condition, warranty, and covenant. And in the premiſſes there is ſometimes a recitall, and ſometimes an exception contained: but all theſe are not eſſential parts of a deed; for a deed may be good, albeit it have not all theſe parts, or it be not ſo formall and orderly drawn and made.

Co. ſuper Lit. 6. 7. Co. 11. 51. 2. 55. Plow. 196.

1. Premiſſes. *Quid.*

The premiſſes of a deed are all the foreparts of the deed before the *Habendum*. And yet this word is ſometimes taken for the thing demiſed, or granted, by the deed. And the office of this part of the deed is rightly to name the grantor and grantee, and to comprehend the certainty of the thing granted, either by expreſſe words, or by that which by reference may be reduced to a certainty, and the exception, or thing to be excepted, if there be any. And, in this part of the deed is the recitall (if there be any in the deed) for the moſt part contained. And herein alſo is ſometimes (though improperly) ſet down the eſtate.

Co. ſuper Lit. 6. 7. 10. 107.

2. *Habendum*, *Quid.*

The *Habendum* of a deed, is that part of the deed which doth begin with, *to have and to hold*. And this doth properly ſucceed the premiſſes. And the office hereof, is to ſet down again the name of the grantee, the eſtate that is to be made and limited, or the time that the grantee ſhall have in the thing granted or demiſed, and to what uſe. And herein alſo is ſometimes, though needleſly, ſet down again the thing granted. But the deed that doth uſually conſiſt of all theſe parts, may be good notwithſtanding ſome of them be omitted, and it be not ſo formally made. For an eſtate may be made by a deed without any *Habendum* at all. As if one give or grant land to another and his heires, without any more words in the deed; or if one give or grant land to another, and limit no eſtate, without any *Habendum* in the deed, and ſeale and deliver this deed, and make livery accordingly; in both theſe caſes the deed is good, and in the firſt caſe an eſtate in fee ſimple is made, and in the laſt caſe an eſtate for life is made. And if the name of the grantee be not contained in the premiſſes, yet if it be in the *Habendum*, it may be good enough (1). As if one give or grant land, *Habendum* to *B.* and his heires, and he is not named in the premiſſes, yet this is a good deed to make an eſtate in fee ſimple. And yet if the thing granted be only in the *Habendum*, and not in the premiſſes of * the deed, the deed will not paſs it. And therefore if a man grant black acre only, in the premiſſes of a deed, *Habendum* black acre and white acre; white acre will not paſs by this deed. But if the thing, newly added, be implied in the thing granted by the premiſſes of the deed, as being an incident thereunto, or otherwiſe; or it be the ſame thing, and expreſſed in other words only; in

Where a deed is good, notwithſtanding ſome ſeeming fault in the premiſſes or in the *Habendum*.

* P. 76.

Plow. 152. Dier 96. Perk. ſect. 251.

(1) One who is not named in the premiſes, may nevertheleſs take an eſtate in remainder, by limitation in the *Habendum*, 2 *Roll. Abr.* 68. *Hob.* 313. In 3 *Leon. Ca.* 60. it is ſaid, that the *Habendum* ſhall never introduce one who is a ſtranger to the premiſes to take as grantee, but he may take by way of remainder. See more amply in *Vin. Abr.* Faits (C. a).

theſe caſes the premiſſes and the *Habendum* may ſtand together. As if one grant a manor, *Habendum* the manor, with the advowſon appendant to the manor; or if one grant a reverſion of land, by the name of a reverſion, in the premiſſes, *Habendum* the land itſelf; in both theſe caſes the deed is good, and the advowſon, and reverſion, will paſs. So alſo if livery of ſeiſin be made of the thing newly added, in this caſe perhaps it might paſs by the livery; and if the thing granted be left out in all, or in part, in the *Habendum*, yet the grant is good. And therefore if one grant land to *A. Habendum* to *A.* his heires, *&c.* or if one grant white acre and black acre to *A. Habendum* white acre to *A.* and omit black acre; yet theſe deeds are good, and all that is contained in the premiſſes of the deed doth paſs in both caſes. And if a feoffment be made to one, *Habendum* to him and his heirs, without the word aſſignes; this is a good feoffment, and the eſtate thereby made is aſſignable: as where a leaſe is made to one his executors and adminiſtrators, without the word aſſignes, this is a good leaſe and aſſignable. So if one grant land to *A. Habendum* to him for one hundred years; or *Habendum* to him and his aſſignes for one hundred years; theſe are as good leaſes as the leaſe that is made by theſe words *Habendum* to *A.* his executors, adminiſtrators, and aſſignes, for one hundred years. So if a leaſe of land be made to *A. Habendum* the land to him and his heirs for one hundred years, this is a good *Habendum*, and the word [heirs] is void, and it ſhall go to his executors, *&c.* As alſo where land is granted to *A. Habendum* to him and his ſucceſſors for one hundred years; this is a good leaſe, and the word [ſucceſſors] void, for it ſhall go to executors, *&c.* And if a leaſe be made *Habendum* for years, and ſay not how many years, this is a good *Habendum*, and a leaſe for two years (1). Lit. 1. Co. ſuper Lit. 46 Co. 6. 35. Termes of the law, tit. Aſſigns.

3. Recitall. *Quid.*

A recitall is the ſetting down, or report of ſomething done before (2).

4. Where it is needfull; or not.

When a man is to take any new eſtate from the King of a thing whereof there is any eſtate in being, there the former eſtate if it be good and of record, muſt be rehearſed and recited in the deed, or elſe the ſecond grant will not be good (3), But in caſe of a common perſon there needs no ſuch recitall; neither when a man is to derive an eſtate out of a former, or aſſign over a term of years, is it needfull there ſhould be any recitall of the former eſtate in being. Co. 1. 45. Dier 77.

5. Where miſrecitall will hurt a deed; or not.

* P. 77.

If one recite or rehearſe an eſtate made for term of years, and *then after grant over that term to another, and miſtake in the recitall; this miſtake may make all void (4). As if a *fieri* Co. 4. 74.

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(1) See further as to the expoſition and operation of the *Habendum*; *Com. Dig.* Faits (E. 9.) and how far the *Habendum* may enlarge, or abridge, explain, or qualify, the premiſes. *Lilly's Conveyancer* 215. *Co. Lit.* 183. 299. a. *Vin. Abr.* Grants from (I. a). to (N. a).

(2) Recital of itſelf is nothing, but being joined, and conſidered with the reſt of the deed, is material; per *Clinch*, 1 *Leon.* 122. A recital is not a neceſſary part of a deed, either in law or equity.—It may be made uſe of to explain a doubt of the intention and meaning of the parties, but it hath no effect, or operation: 3 *Chan. Ca.* 101. A recital is not concluſive, becauſe it is no direct affirmation: *Co. Lit.* 352. b. It is ſaid covenant will lie upon a recital, ſee *Graves* v. *White.* 2 *Eq. Ca. Abr.* Portions (C). But recitals ſhall not make an eſtoppel, for they are not material. *Finch's Law* 33.

(3) For the doctrine of grants by the King, and when they ſhall be good or void, ſee *Vin. Abr.* Prerogative of the King (G. b. 2). *&c.* In what caſes falſe recital ſhall make them void, *ibid* (Q. b.) When a recital is neceſſary in them *ibid*, (Q. b. 2.) and further in *Bac. Abr.* Prerogative (F).

(4) If a leaſe is miſrecited, and then the land comprized in it is granted, *Habendum* for twenty-one years after the expiration of that leaſe: it is a good grant for twenty-one years after the expiration of the former leaſe; notwithſtanding the miſrecital. 1 *Lev.* 235.

facias

facias come to a ſheriff to levy a debt, and he by writing recite that the defendant hath a term of years, and doth ſuppoſe it to begin 1 *Maii*, 2 *Jac.* when in truth it doth begin the 20th. of *Auguſt*, and then ſell the ſame term; in this caſe this ſale is void. But if he add withall theſe words in the deed [and all the intereſt that the defendant had in the land]; or if he make ſale of it for a certain number of years only; this grant may be good notwithſtanding the miſrecitall.

Dier 93. 160. If one recite a former leaſe to be made ſuch a day to *I. S.* and then make a new leaſe to begin after the end of the former leaſe, and miſtake the date of the old leaſe; in this caſe the deed is good notwithſtanding this miſtake.

8 H. 7. 3. Fitz. Grant. If one grant a reverſion, and in reciting the leaſe in poſſeſſion miſtake the date of it only and recite all the reſt truly; this will not hurt the grant. No more than where a man doth recite that ſuch land came to him by forfeiture, and then doth grant it by name; for in this caſe albeit it did not come to him by forfeiture but by ſurrender, yet this miſtake will not hurt. And yet in caſe of the King ſuch a miſrecitall may make the grant void.

Dier 50. 87. 376. If I grant to *I. S.* all the lands in *Dale* which I purchaſed from *I. D.* or which came unto me by deſcent from *I. D.* or I give all my goods to *I. S.* which I have as executor to *I. D.* and in truth I have no ſuch lands, or goods, but I had them by ſome other means, or of ſome other perſon; in theſe caſes, and bythis miſtake, the deed is void. But if I grant to *I. S.* all my lands in *Dale* by name, as white acre, which I purchaſed of *I. D.* and in truth I did purchaſe them of another, in this caſe this miſtake will not hurt the deed. So if I grant twenty load of wood in Dale, in the great wood which I had of the grant of my father, and in truth I had it not of the grant of my father, but of the grant of another, in this caſe the grant is good (1). But of this matter ſee more in Grant *Numb.* 4. *part* 5.

6. Exception, *Quid.*

Plow. 361. 195, Dier 59. Perk. ſect. 625. Co. ſuper Lit. 47. 3 H. 6. 45. An exception is a clauſe of a deed whereby the feoffor, donor, grantor, leſſor, *&c.* doth except ſomewhat out of that which he had granted before by the deed (2). And this doth moſt commonly and properly ſucceed the ſetting down of the things granted, and is made by one of theſe words *except*, *præter*, *ſalvo*, *ſi non*, or ſuch like. And hereby the thing excepted is exempted, and doth not paſs by the grant, neither is it parcell of the thing granted: as if a manor be granted excepting one acre thereof, hereby in judgement of law that acre is ſevered from the manor. But this may be in any part of the deed, and ſo hath it been reſolved. *Hil.* 17 *Car.*

B. R. Fregunnel's caſe. Perk. Sect. 62, &c.

7. What ſhall be ſaid a good exception; or not.

In every good exception theſe things muſt always concurr, 1. This exception muſt be by apt words. 2. It muſt be of part * of the thing granted, and not of ſome other thing. 3. It muſt be of part of the thing only, and not of all, the greater part, or the effect of the thing granted (3). 4. It muſt be of ſuch a thing as is ſeverable from the thing which is granted, and not of an inſeparable incident. 5. It muſt be of ſuch a

* P. 78.

Plow. 19. Co. ſuper Lit. 47.

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(1) When a recital is neceſſary, ſee in *Com. Dig.* Grant G. 10. how far it ſhall be conſidered as evidence, *ibid*, Evidence (B. 5). and further in *Vin. Abr. tit.* Relation.

(2) And being the act and words of the feoffor, *&c.* ſhall therefore be taken againſt him *ſtrictè*, 10 *Co.* 106. b.

(3) For if the exception extends to the whole thing granted, or demiſed, it is void, *Dorrel* v. *Collins*, *Cro. Eliz.* 6.

thing

thing as he that doth except may have and doth properly belong to him. 6. It muſt be of a particular thing out of a generall, and not of a particular thing out of a particular thing or of a part of a certainty. 7. It muſt be certainly deſcribed and ſet down. As for examples. [a] If a man grant all his lands in *Eſſex*, ſaving, beſides, or except his lands in *Dale*, or all his lands in *Dale*, excepting one houſe, or one acre in certain; or one houſe, excepting one chamber in certain; theſe and ſuch like exceptions are good (1). [b] And if one grant a manor, excepting one tenement (parcell of the manor), or excepting the ſervices of *I. S.* (who doth hold of the manor), or excepting one cloſe, or excepting one acre, or excepting the advowſon appendant, or excepting the woods, or excepting twenty acres of wood, or excepting all the groſſe trees; theſe are good exceptions.

a Plow. 195. Perk. Sect. 641.

b Dier 103. Plow. 104. 361, 67. Co. 8. 63. 11. 47. 5, 11. Perk. ſect. 642. 3 H. 6. 35.

[c] And if one grant a meſſuage and houſes thereunto belonging, excepting the barn, or excepting the dovehouſe; it ſeems this is a good exception, for they may paſs by the grant of a meſſuage *&c.* [d] And if one grant land, excepting the timber trees thereupon, or excepting the trees thereupon; or if a man ſell a wood, excepting twenty of the beſt oaks, and ſhew which in certain; theſe are good exceptions. [e] So if one have a manor wherein is a wood called the great wood, and he grant his manor, excepting all the woods and underwoods that grow in the great wood and all the trees that grow elſewhere, this is a good exception. [f] And if one grant a meſſuage and all the lands and tenements thereunto belonging, excepting one cottage; this is a good exception. [g] And if one grant a reverſion, excepting the rent; this is a good exception of the rent, and doth keep it from paſſing by the grant. So if a man have a rent-charge out of land, and he releaſe his right in the land, except the rent; ſo if the Lord releaſe to his tenant *ſalvo dominio ſuo*, *&c.* theſe are good exceptions. [h] And if one grant all his horſes, except his white horſe; this is a good exception of the white horſe. [i] And if a man be ſeiſed of a manor, and leaſe it by deed indented for life, *exceptis & reſervatis quod bene liceat* to the leſſor *ſuccidere*, *dare & vendere omnes groſſas arbores in dicto manerio creſcentes*, *&c.* it ſeems this is a good exception of the trees (2). But if the exception be of another thing than the thing granted; [k] as if one grant a manor or land, excepting 12*d.* or excepting the tithes, or excepting one acre of ground which is no parcell of the manor or of the land before granted; or if one grant the land deſcended to him of the part of his father, excepting the land deſcended to him of the part * of his mother; theſe exceptions are void. [l] Or if the exception be ſuch as it is repugnant to the grant, and doth utterly ſubvert it, and take away the fruit of it, as if one grant a manor or land to another, excepting the profits thereof; or make a feoffment of a cloſe of meadow or paſture, reſerving or excepting the graſſe of it; or grant a manor, excepting the ſervices; theſe are void exceptions. [m] So if one grant his houſe, chambers, cellars, and ſhops, excepting his ſhops; it is ſaid

c 14 H. 8. 1.

d Co. 8. 63. 5. 23.

e In the caſe of Haward & Fulcher. Hil. 3. Car. B. R.

f Co. 11, 64.

g Perk. Sect. 113, 644. Dier 157.

h Plow. 361.

i 3 H. 6, 45. Perk. Sect. 643.

k Perk. Sect. 639. Dier 59. Plow. 361. 67. 370.

* P. 79.

l Dier 97. 264. Co. ſuper Lit. 47. Plow. 153. 103. 104. 14 H. 8. 1. Doct & Stud. 98.

m Dier 59. 263.

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(1) See diſtinction between a *ſaving* and an *exception*, in *T. Raym.* 359. *Plowd.* 361. An *exception out of an exception*, or a ſaving out of a ſaving, is good enough, and makes the thing as if it had never been excepted. *Leigh* v. *Shaw*, *Cro. Eliz.* 372.

(2) If a man lets his manor, *exceptis omnibus boſcis*, the ſoil of the wood is excepted; but it remains parcel of the reverſion of the manor, and ſhall paſs by a grant, or leaſe, of the manor. 5 *Co.* 11. *Cro. Eliz.* 521.

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this is no good exception. And by the like reaſon if one grant his meadow and paſture grounds, except his meadow grounds, this exception is not good, no more than if one grant two manors, or two acres, excepting one of them. And of this opinion was the Chief Juſtice in *B. R. Hil.* 3 *Car.* in the caſe of *Haward* and *Fulcher*. [n] And yet if a man make a leaſe for years of a mill, excepting the profits thereof during the life of the leſſor; it is ſaid, this hath been adjudged a good exception. But I doubt of this caſe, for the exception of the profits of a thing is the exception of the thing itſelf. And a man cannot grant an eſtate and reſerve a part of the eſtate; as make a feoffment in fee, and reſerve a leaſe for life; or grant an advowſon, and reſerve the preſentation for his life. [o] Or if the exception be of an inſeparable incident and a thing that cannot be granted by it ſelf and from another, as if a manor be granted, excepting the Court Baron, or land be granted, excepting the common appendant thereunto belonging; theſe exceptions are void. But exceptions of ſeverable incidents are good. [p] Or if the exception be of ſuch a thing as the grantor cannot have nor doth belong to him by law; as if a leſſee for years aſſign over all his term in the land, excepting the timber trees, earth, or clay; this exception is not good (1). But if leſſee for life make a leaſe for years, or leſſee for twenty one years make a leaſe for twenty years; or tenant by the curteſie, or in dower, grant over their eſtate, excepting the timber trees; theſe are good exceptions. And if a leſſee for life or years open a coal mine, and then aſſign over his eſtate, excepting the mines or the profits thereof; theſe are void exceptions. [q] Or if the exception be of a particular thing out of a particular thing, as if one grant white acre and black acre, excepting white acre, or grant twenty acres of land by particular names, excepting one acre of them; theſe exceptions are void. [r] Or if the exception be ſet down uncertainly, as if one grant a houſe, excepting one chamber; or grant a manor, excepting one acre; but doth not ſet forth which chamber, or which acre it ſhall be; theſe exceptions are void (2).

n Plow. 524. Dier 264. Br. grant. 60. 38 H. 6. 38.

o Co. ſuper Lit. 150.

p Co. 5, 12. Hil. 9. Jac. B. R per Curiam.

This difference hath been agreed.

q Co. ſuper Lit 47. Plow. 53.

r Perk. Sect. 643. 641.

8. *Tenendum. Quid.*

Co. ſuper Lit. 6. & Co. 9. 130.

A *Tenendum* is a clauſe of the deed whereby the tenure was heretofore created. And this doth moſt commonly and properly ſucceed the *Habendum*, and was made by this word *tenendum per ſervitium, &c.* But ſince the ſtatute of *Quia emptores terrarum* * when the fee ſimple doth paſs, the tenure is alwaies of the chief Lord, and is thus ſet forth, *tenendum de capitalibus dominis, &c.* And this clauſe at this day is for the moſt part omitted altogether (3).

* P. 80.

9. Reſervation or *Reddendum. Quid.*

Co. 10. 107. Plow. 132. Co. ſuper Lit. 47. Perk. Sect. 625.

A reſervation is a clauſe of a deed whereby the feoffor, donor, leſſor, grantor, &c. doth reſerve ſome new thing to himſelf out of that which he granted before. And this doth, moſt commonly, and properly, ſucceed the *Tenendum*, and is made by one or more of theſe words, *reddend', reſervand', ſolvend', faciend', inveniend'*, or ſuch like. This doth differ from an exception, which is ever of part of the thing granted, and of a thing in *eſſe* at the time; but this is of a thing newly created or reſerved out of a thing demiſed that was not in *eſſe* before; ſo that this

(1) Thoſe things not being in his power, for they do not belong to him by law, 5 *Co.* 12. b.

(2) See further by what words an exception may be made, the effect of it, and when it ſhall be void; in *Com. Dig.* Fait (E. 5).

(3) Ante 514 note 1.

doth alwaies reſerve that which was not before, or abridge the tenure of that which was before.

10. What ſhall be ſaid a good reſervation; and what not.

In every good reſervation theſe things muſt alwaies concurr. 1. [a] It muſt be by apt words. 2. It muſt be of ſome other thing iſſuing, or coming out of the thing granted, and not a part of the thing itſelf, nor of ſome thing iſſuing out of another thing. 3. It muſt be of ſuch a thing whereunto the grantor may have reſort to diſtrain. 4. It muſt be made to one of the grantors, and not to a ſtranger to the deed. As for examples. [b] If a man grant land, yielding and paying money or ſome ſuch like thing yearly; this is a good reſervation. But if the grantee covenant to pay ſuch a ſum of money, or to do ſuch a thing yearly; this is no good reſervation, but a covenant to pay a ſum of money in groſſe, and not as a rent (1). [c] If a leaſe be made for years, rendering a rent to the leſſor or his heirs, in the disjunctive; or rendering a rent to the leſſor, without ſaying [and his heirs, &c.]; or rendering a rent during the ſaid term, and doth not ſay to whom; or rendering 10*l.* to the leſſor, and 5*l.* to his heirs; all theſe reſervations are good. But if a leaſe be made, rendering rent to the heires of the leſſor; this reſervation is void becauſe the rent is not reſerved to himſelf firſt. [d] If one grant land, yielding for rent, money, corn, a horſe, ſpurrs, a roſe, or any ſuch like thing; this is a good reſervation: but if the reſervation be of the graſs, or of the veſture of the land, or of a common, or other profit to be taken out of the land; theſe reſervations are void. [e] If one grant a manor, meſſuage, land, meadow, or paſture, or the veſture or herbage of land, meadow, or paſture, rendring a rent; this is a good reſervation. But if one grant tithes, rents, commons, advowſons, offices, a corody, mulcture of a mill, a faire, market, priviledge, or liberty, reſerving a rent; this reſervation is void. And yet ſuch a reſervation in caſe of the King is good. And in caſe of a ſubject alſo, if a leaſe be made by deed in writing of any ſuch thing for a term of years, reſerving a rent; this may be good by way of contract to * produce an action of debt, though not as a rent to be diſtrained for. And thus by apt words, an apt rent out of manors, and ſuch like memorable things, or divers rents, may be reſerved upon one grant. As if one grant the manors of *A.* *B.* and *C.* rendring for *A.* 20*s.* for *B.* 20*s.* and for *C.* 20*s.* theſe are good rents, and ſeveral. So if one grant the manors of *A.* *B.* and *C.* rendring 3*l.* *viz.* for *A.* 20*s.* for *B.* 20*s.* and for *C.* 20*s.* this is a good reſervation; but in this caſe the rent is entire (2). Alſo one may reſerve one rent one year, and another rent another year; as 10*s.* one year, and 20*s.* another year: or one may reſerve a rent to be paid every ſecond, or third year, and no rent the other years; or one may reſerve one kind of rent one year, and another kind of rent another year; and theſe reſervations are good. And theſe reſervations may be by fine, as well as by deed; or it may be in caſe where the leſſor hath a reverſion of the land, or upon a partition to make an equality, without any deed at all. But if it be upon an exchange to make an equality, it is not good except it be by deed. [f] If two joynt-tenants joyn in the grant of their land by deed indented, and

Covenant.

Prerogative.

* P. 81. Deed.

a Plow. 13. Perk. Sect. 626. Co. 8. 78.

b Plow. 132.

c Co. 5. 111. 8. 71. ſuper Lit. 214. 213. 99.

d Co. ſuper Lit. 142.

e Co. ſuper Lit. 47.

Co. 5. 3. Perk. Sect. 626.

Co. 555. Dier 308. Co. ſuper Lit. 47. 164. 213.

Co. ſuper Lit. 225. 8 H. 7. 9. Bro. Fine 36. Reſervation 4.

f Co. ſuper Lit. 214. 143. 47. Dier 222.

(1) See accordingly *Athowe* v. *Heming*, 1 *Roll. Rep.* 80. 2 *Bulſt.* 281. S. C.

(2) And if *A.* makes a leaſe of three manors, rendering 10*l.* rent, (*viz.*) 5*l.* out of one, and 5*l.* out of another; this will be a good leaſe and reſervation, and the third ſhall be diſcharged. *Moor* 880.

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the rent is reſerved to one of them; this is a good reſervation, and ſhall go to him alone. But if it be by word, or by deed poll, that the leaſe is made, the rent ſhall go to them both.

g Adjudged Mich. 8 Car. in Bland's caſe.

[g] And if a man poſſeſſed of a term, joyn his wife with him, and they both aſſign over this term by indenture, rendring a rent to them two, and the ſurvivor of them, and ſhe doth not ſeal the deed; in this caſe the reſervation as to the wife is void. And if the reſervation be of the rent to a ſtranger that is no party to the deed, and to him only, this reſervation is void.

Hobart's Rep. 274. Oates & Fith. Co. 3.

And therefore if the father and his ſon and heir apparent, by indenture, leaſe his land for years, to begin after the father's death, rendring rent to the ſon, it is void.

10. Condition, *Quid.*

A condition is a clauſe of reſtraint in a deed, or a bridle annexed and joyned to an eſtate, ſtaying and ſuſpending the ſame, and making it incertain whether it ſhall take effect or no.

11. Warranty, *Quid.*

A warranty is a clauſe or covenant made in a deed by the one party unto the other, whereby the feoffor, donor, or leſſor, doth, for him and his heirs, grant to warrant and ſecure land granted to the feoffee, donee, or leſſee, and his heirs during the eſtate.

12. Covenant, *Quid.*

A covenant is a clauſe of agreement contained in a deed, whereby either party is bound to do, perform, or give ſomething to the other. And of all theſe ſee at large afterwards.

Co. ſuper Lit. 302. Perk. Sect. 66.

13. How and to what purpoſe a deed of grant in groſs ſhall enure and be conſtruedand taken.

In the conſtruction of deeds it muſt be conſidered, 1. How a deed in the groſs ſhall be taken and enure. 2. How it ſhall be taken and expounded in the ſeveral parts and pieces of it. And for the firſt, theſe rules are to be known; 1. If divers joyn in a deed, and ſome are able to make ſuch a deed, and ſome are not, this ſhall be * ſaid to be his deed alone that is able; as if divers joyn in the grant of a thing by deed, and one alone hath all the eſtate, and the reſt have nothing in the thing granted; it ſhall be ſaid to be his grant alone that hath the eſtate. And ſo *e converſo*. If a deed be made to one that is incapable, and to others that are capable, in this caſe it ſhall enure only to him that is capable. 2. A deed that is intended and made to one purpoſe, may enure to another; for if it will not take effect that way it is intended, it may take effect another way. And therefore a deed made and intended for a releaſe, may amount to a grant of a reverſion, an atturnment, or a ſurrender, or *è converſo*. And if a man have two ways to paſs lands by the common law, and he intendeth to paſs them one way, and they will not paſs that way; in this caſe *ut res valeat* it may paſs the other way. As if a man be ſeiſed of two acres of land in fee, and letteth one of them for years, and after intending to paſs them both by feoffment, maketh a charter of feoffment, and maketh livery of the acre in poſſeſſion in the name of both the acres; in this caſe the acre in poſſeſſion only doth paſs: but if the leſſee of the other acre atturn, then the reverſion of that acre will paſs alſo. But where a man may paſs lands by the common law, or by raiſing of a uſe, and ſettling it by the ſtatute, there in many caſes it is otherwiſe. As if the father make a charter of feoffment to his ſon, and a letter of atturney to make livery, and no livery is made; in this caſe no uſe ſhall ariſe to the ſon. So if a man, in conſideration of marriage, make a feoffment with a letter of atturney to give livery, and no livery is made; in this caſe no uſe will ariſe. And ſo it was held by Chief Juſtice *Popham B. R.* for the intention of the parties doth work much,

* Page 82.

Dier 251. Co. 2. 35. & ſuper Lit. 49.

in

in the raiſing and direction of uſes. And therefore it is ſaid, that when a man doth intend to paſs land one way, it ſhall never paſs another way, contrary to his intent; as if one covenant for good conſiderations to levy a fine of land to the uſe of *I. S.* and his heirs, if no fine be levied, no uſe ſhall ariſe upon the covenant. If one by the words, bargain and ſell, give and grant, make a feoffment of his houſe for money, and intending to paſs it by way of bargain and ſale and inrolment, the deed being made, there being a Maſter of the Chancery in the houſe whereof the feoffment is made, he doth acknowledge and deliver the deed before him; in this caſe if the deed be not inrolled, the conveyance is void, and that delivery ſhall not amount to a livery of ſeiſin. And yet when the intent is apparent to paſs it one way, or another, there it may be good either way; as where one doth make a feoffment in fee, with a letter of atturney to make livery; and in the ſame deed doth covenant, in caſe livery of ſeiſin be not had to perfect the deed, to ſtand ſeiſed to the uſes of the feoffment; in this caſe, albeit no livery of ſeiſin be made, or atturnment had, to perfect the feoffment or grant, yet if it be in ſuch a caſe where there is a
* P. 83. * conſideration ſufficient to raiſe the uſes by the covenant, the uſes will ariſe by the covenant (1). 3. When a deed may enure to divers purpoſes, he to whom the deed is made, ſhall ſhall have election which way to take it, and he may take it that way as ſhall be moſt for his advantage. As if a deed of grant be made by the words *dedi & conceſſi*; this in law may amount to a grant, feoffment, gift, leaſe, releaſe, confirmation, or ſurrender; and it is in the choice of the grantee to plead or uſe it the one way or the other. So if a leaſe for years be made to me of land for money, by the words demiſe, grant, bargain, and ſell; I may take and uſe this by way of bargain and ſale, or by way of demiſe, at my pleaſure. So if one have a rent out of land whereof I and my wife are jointly ſeiſed, and he doth by his deed releaſe, give and grant this rent to me; in this caſe, I may uſe this as a releaſe to extinguiſh the rent, or as a grant of the rent, as it may make moſt for my advantage. *Et ſic de ſimilibus.* But where any inconvenience may grow by ſuch an election, there the grantee ſhall not have an election, but it ſhall enure as it may; as, where a man may paſs land by the common law, or by raiſing of an uſe and ſettling it by the ſtatute, there ſometimes it is ſo. And therefore if in the ſame caſe before, a father make a charter of feoffment to his ſon, and a letter of atturney to make livery, and no livery is made; hereby no uſe will ariſe to the ſon, as it will in caſe of a covenant. And if a leaſe for years be made of a manor, by the words bargain, ſell, demiſe, and grant, and this is to begin at a day to come; in this caſe it muſt paſs entirely as a demiſe at the common law, or entirely as a bargain and ſale, and the leſſee hath not election to take or uſe it otherwiſe, or to uſe it for part one way, and for part another way. 4. It ſhall enure as much as may be according to the apparent intent of the parties. And therefore it is, that if a feoffment be made of a manor with an advowſon appendant; or a bargain and ſale of land in poſſeſſion, and land in reverſion together, be made; and the feoffment is not well executed for want of livery

Dier 96.

19 Eliz. Thorold & Gordens caſe.

Experientia.

Co. ſuper Lit. 301. Dier 251.

Co. 2. 36. Dyer 30. 302.

Dier 109. 319.

Co. 2. 35, 36.

Finche's law. 58.

(1) See accordingly *Bac.* Uſe of the law, 151. *Gilb.* Law of uſes 84. *poſt.* 165. and fully in the chapter on Uſes.

of ſeiſin or atturnment, or the deed of bargain and ſale is not inrolled; in theſe caſes, albeit the advowſon may paſs without livery or atturnment, and the reverſion without inrolment, yet becauſe the intent doth appear to be that all ſhall paſs together, therefore neither the advowſon, nor the reverſion, will paſs by this deed. 5. When a deed is made, it ſhall enure as it may, and ſo as it may have and take the moſt and beſt effect that may be according to reaſon; as if tenant for life, or years, and he in remainder or reverſion in fee, join in a feoffment by deed; this ſhall enure in the firſt caſe as the leaſe of the tenant for life, and the confirmation of him in the remainder or reverſion, and in the laſt caſe as the feoffment of him in the reverſion, *&c.* and the ſurrender of the leſſee for years to the feoffee; and no forfeiture of the eſtate in the leſſee for life. But if in this * caſe the feoffment be by word, it ſeems it ſhall enure firſt as a ſurrender of the eſtate of the tenant for life, and then the feoffment of him in reverſion, *ut res valeat*. And if *A.* be tenant for life, the remainder to *B.* for life, the remainder to *D.* in taile, the remainder to the right heirs of *B.* and *A.* and *B.* join in a feoffment by deed, in this caſe, this is the feoffment of *A.* and confirmation of *B.* but a forfeiture of both their eſtates, whereof the tenant in taile may take preſent advantage (1). If tenant for life grant a rent charge to him in reverſion in fee, and he by his deed doth grant this rent over to another and his heirs; this is a good grant and confirmation alſo, to make the rent paſs to the ſecond grantee in fee ſimple. So if a diſſeiſor make a leaſe for life, the remainder to the diſſeiſee, and the diſſeiſee doth grant the remainder over; this is a good grant and confirmation alſo. If *A.* do bargain and ſell his land to *B.* by indenture, and before inrolment they do both grant a rent charge to *C.* by deed, and after the indenture is inrolled; in this caſe, after the inrolment this ſhall be ſaid to be the grant of *B.* and the confirmation of *A.* and if the deed be not inrolled, it ſhall be ſaid to be the grant of *A.* and confirmation of *B.* If one makes a charter of feoffment of one acre of land to *A.* and his heirs, and another deed of the ſame acre to *A.* and the heirs of his body, and deliver ſeiſin according to the form and effect of both deeds; it ſeems this ſhall enure by moieties, *viz.* he ſhall have an eſtate taile in the one moiety with the fee ſimple expectant, and and a fee ſimple in the other moiety. If two ſeverall tenants of ſeverall lands join in a leaſe for years by deed indented; theſe be ſeverall leaſes, and ſeverall confirmations from each of them from whom no intereſt paſſeth, and doth not work by way of eſtoppell. If *B.* tenant for life of *C.* and he in remainder, or reverſion in fee of the ſame land, join in a leaſe for life, or years, by deed indented; this ſhall enure during the life of *C.* as the leaſe of *B.* and the confirmation of him in reverſion, or remainder, and after the death of *C.* as the leaſe of him in reverſion, or remainder, and the confirmation of *B.* without any eſtoppell. If tenant in taile, and he in reverſion, grant a rent charge in fee, it ſhall be taken to be the grant of the tenant in taile, and the confirmation of him in reverſion; but when the tenant in taile dieth without iſſue, it ſhall be taken to be the ſole grant of him in reverſion. If two jointenants be in fee of an acre of land, and they leaſe it to a ſtranger for life, and the leſſee grant his eſtate

Plow. 140. 9. Co. ſuper Lit. 30a.

* P. 84.

Forfeiture. Cc. 5. 15.

Co. ſuper Lit. 147.

Co. ſuper Lit. 22.

Co. ſuper Lit. 45.

Eſtoppell.

Perk. Sect. 80.

(1) See accordingly. *Co. Lit.* 251. b.—

to one of the leſſors; in this caſe it ſeems it ſhall enure for a moiety by way of grant, and for the other moiety by way of ſurrender.

If there be Lord and tenant, and the Lord grant his ſeigniory to his tenant, and to a ſtranger; this ſhall enure for a moiety to the tenant by way of extinguiſhment, * and for the other moiety to the ſtranger by way of grant. If tenant for life of the grant of a woman ſole, grant his eſtate to the huſband of the wife, this ſhall enure for the whole by way of grant. Perk. Sect. 81. Dier. 140. Perk. Sect. 82, 83.

If a leaſe be made for life, the remainder for life to a ſtranger, and the leſſee grant his eſtate to his leſſor, this ſhall enure by way of grant. If there be Lord and two joynt-tenants in fee, and the lord grant his ſeigniory to one of his tenants in fee; it ſeems this ſhall take effect for the whole by way of extinguiſhment. If there be leſſee for life, and the reverſion deſcend to two coparceners, and one of them take a huſband, and the leſſee grant his eſtate to the huſband and wife; this ſhall enure by way of grant for the whole. If the diſſeiſee, and the heir of the diſſeiſor (being in by deſcent,) make a feoffment by one deed, and livery of ſeiſin thereupon; this is the feoffment of the heir only and the confirmation of the diſſeiſee (1). 6. If one have divers eſtates in land, and he make any charge or grant upon or out of it; this ſhall iſſue out of all his eſtates. And if one have a poſſeſſion and an ancient right, and grant a rent charge out of the land, or make a leaſe of the land; this ſhall iſſue out of both the eſtates, and it ſhall enure from him having ſeveral eſtates, as it ſhall enure from ſeveral perſons having the ſame eſtates. *Quando duo jura concurrant in una perſona, æquum eſt ac ſi eſſent in diverſis.* 7. If one that hath a rent charge out of a manor, by grant reciting his grant, grant the ſame rent to a leſſee for life of the manor out of which the rent doth iſſue, to have and perceive to him and his heirs, and ſurrender to him the deed; this ſhall not enure to extinguiſh the rent, but by way of grant, of which the heir of the leſſee for life may take advantage, if he do not by granting away the rent, purchaſing the reverſion of the manor, or making a feoffment of the manor, and thereby committing a forfeiture, or by ſome ſuch like means prejudice himſelf; for by theſe means the rent will be extinct and determined. If a diſſeiſor grant a rent to the diſſeiſee, and he by his deed doth grant it over to another; or the diſſeiſor make a leaſe for life, or gift in tail, the remainder to the diſſeiſee, and the diſſeiſee doth grant over this remainder, and the tenant atturn; theſe grants of the diſſeiſee ſhall be taken for a grant and a confirmation alſo, *ne res pereat*. If there be Lord and tenant of white acre and two other acres, and the Lord grant by deed to his tenant that he will not diſtrain his tenant in white acre for his ſervice; this grant ſhall not enure to determine the ſeigniory in any part, but as a covenant, ſo that if he do diſtrain in white acre, the tenant may have an action of covenant. If a man have a wood of 200 acres, and he grant it to another for life or years, and that he ſhall cut therein four or five acres every year; in this caſe, albeit the wood be granted and the grant ſhall enure to paſs it, yet the grantee can * cut no more but four or five acres by the year;

Co. ſuper Lit. 372. Co. 7. 14. 1. 147, 148. 5 E. 4. 2.

Perk. Sect. 592.

Co. ſuper L.t, 302.

Perk. Sect. 69.

Mich. 37 & 38 Eliz. B. R. Curia.

* P. 85.

* P. 86.

(1) What is deemed a diſſeiſin, ſee *Co. Lit.* 153. 181. F. N. B. 177. The conſequences of *actual diſſeiſin*, conſidered *as ſuch*, continue law to this day: the diſſeiſee cannot diſpoſe, or deviſe; the deſcent takes away his entry. *per* Ld. *Mansfield* in 1 *Burr.* 112.

And yet the grantor, as this case is, cannot himself cut any of the wood during the time; as in case where a man doth grant to another, that he shall cut every year four or five acres in such a wood: for in this case the grantor may notwithstanding cut as much as he will. And here note, that in all the cases before, according to the construction that the law makes of the deed, so must the party, that is to use it, set it forth and plead it; as when it shall enure as a lease, then it must be pleaded as a lease, &c. See more in *release, numb.* 9. *Surrender, numb.* 7. *confirmation, numb.* 7.

14. How a deed of grant shall be construed and taken in all the parts and branches thereof.

In the construction of deeds it must be observed, that there are some general rules that are appliable to all the parts of all kinds of deeds, and some that are appliable only to some kind of deeds, and to some part of the deed only. In the construction therefore of all parts of all kinds of deeds, these rules are universally observed:

General rules.

Co. super Lit. 313 Lit. Sect. 563. Plow. 160. 154.

1. That the construction be favourable, and as near to the minds and apparent intents of the parties, as possible it may be, and law will permit: for *benigne sunt faciendæ interpretationes chartarum propter simplicitatem laicorum. Et verba intentioni non è contra debent inservire.* As, if there be Lord and tenant, and the tenant grant the tenements to one man for term of his life, the remainder to another in fee, and the Lord grant the services to the tenant for life in fee; in this case, howbeit a grant may enure by way of release, and a release to the tenant for life shall enure to him in remainder, and is an extinguishment, yet, because this is contrary to the intent, it shall be taken for a suspension only of the services during the life of the tenant for life, and the services shall go afterwards to his heir. But if the intent of the parties be apparently against law, then the construction shall not apply the deed to their intent: as if one give land to another and his heirs for twenty years; in this case the executor, and not the heir, shall have this land after the death of him to whom it is given. So if one by deed intending to give land to another and his heirs, give the land to him, to have and to hold to him, or to him and his assigns, for ever, without these words [and his heirs] this is but an estate for life at the most.

Doct. & Stud. 39. Lit. cap. 1.

Plow. 161. 16 H. 8. 10. Dier 15. Fitz. Barre. 237. Bro. Don. 14. 17 E. 3. 7. 46 E. 3. 17.

2. That the construction be reasonable and according to an indifferent and equal understanding: and therefore if I grant to another, common in all my manor, this shall be expounded to extend to commonable places only, and not in my gardens, orchards, &c. And if I grant to one estovers out of my manor, he may not by this cut down my fruit trees. And if one grant me (a Barrister) a fee *pro consilio*; this shall be taken for counsel in law only. And so in case of a physician. And if one grant to me to dig in all his * lands for tinne; I may not by this grant dig under his house. And if one grant me common for all my beasts; this shall be taken for all my commonable beasts, and not for goats, and the like. And if one grant me all his trees in his manor; by this I shall not have his apple trees (1). And if one lease to me his house and land, to the end that I may make profit thereof in the best manner; by this grant I may not prostrate the house or make waste.

* P. 87.

(1) See accordingly *Hob.* 304.

3. That

3. That too much regard be not had to the native and proper definition, ſignifications, and acceptance of words, and ſentences, to pervert the ſimple intentions of the parties: for a manor may paſs by the name of a meſſuage, or a knights fee, if it be uſed ſo to be called: *& ſic è converſo*, a meſſuage by the name of a manor; a remainder may be granted by the name of a reverter; a reverſion by the name of a remainder: for the law is not nice in grants, and therefore it doth oftentimes tranſpoſe words contrary to their order, to bring them to the intention of the parties (1): and it is a rule of law, *Mala grammatica non vitiat chartam*, neither falſe Latine, nor falſe Engliſh, will make a deed void when the intent of the parties doth plainly appear. It is therefore held that two negatives do not make an affirmative, when the apparent intent is contrary. And it is another rule of law, *falſa orthographia non vitiat conceſſionem.* Plo. 154. 170. 134. Dier 46. Co. ſuper Lit. 223. 146. 217. Co. 9. 48. 10. 1, 3.

4. That the conſtruction be made upon the entire deed, and that one part of it doth help to expound another, and that every word (if it may be) may take effect and none be rejected, and that all the parts do agree together and there be no diſcordance therein. *Ex antecedentibus & conſequentibus eſt optima interpretatio*: for *Turpis eſt pars quæ cum ſuo toto non convenit. Maledicta expoſitio quæ corrumpit textum.* If a man make a feoffment of all his land in *D.* with common *in omnibus terris ſuis*; this common ſhall be intended in the lands granted in *D.* only, and not elſewhere; for it muſt be underſtood *ſecundum ſubjectam materiam.* Plow. 160. 161.

5. That the conſtruction be ſuch as the whole deed and every part of it may take effect, and as much effect as may be to that purpoſe for which it is made (2); ſo as when the deed cannot take effect according to the letter, it be conſtrued ſo as it may take ſome effect or other: *Verba debent intelligi cum effectu. Et benigne faciendæ ſunt interpretationes, ut res magis valeat quam pereat.* And therefore if an annuity be granted *pro conſilio impendendo*, or a feoffment made *ad erudiendum filium*, or *ad ſolvendum* 10*s.* theſe ſhall be conſtrued conditionall grants without any words of condition; for otherwiſe the party will be without remedy. Lit. Sect. 283. Finche's Ley 60. Plow. 160. 154.

6. That all the words of the deed in conſtruction be taken moſt ſtrongly againſt him that doth ſpeak them, and moſt in advantage of the other party: *Verba Chartarum fortius accipiuntur contra proferentem: & quælibet conceſſio fortiſſime contra donatorem interpretanda eſt* (3). * And therefore if one ſeiſed of land in fee grant it to another, and ſay not for what time, this ſhall be taken an eſtate for life. But this is to be underſtood with this limitation, that no wrong be thereby done, for it is a maxim in law, *quod legis conſtructio, non facit injuriam.* And therefore if tenant for life grant the land he doth hold for life, to another, and doth not ſay for what time; this ſhall be taken Co. ſuper Lit. 183. Finch of the Law 6.

* P. 88.

Forfeiture.

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(1) "For the words are not the principal things in a deed, but the intent and deſign of the grantor." And the words are to be conſtrued in a manner moſt agreeable to the meaning of the grantor; and words which are merely inſenſible, are to be rejected. 3 *Atk.* 136. *per* Ld. Ch. J. *Willes*, who there lays down ſome general rules for the conſtruction of deeds.

(2) This is a rule both in law and equity, *per* Ld. Cr. *Parker*, 1 *Pr. Wms.* 457.

(3) This rule muſt be underſtood with a reſtriction; for a diſtinction ſhould be made between an indenture, and a deed poll: the latter is executed by the grantor alone, and the words are his only, and ſhall therefore be taken moſt ſtrongly againſt him; but in an indenture executed by both parties, they are to be conſidered as the words of them both. *Plow.* 134. this rule from its ſtrictneſs, and rigor, is the laſt to be reſorted to; and is never to be relied on, but where all other rules of expoſition fail. *Bac. Elem. reg.* 3.

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an eſtate for his own life, and not the life of the grantee, for then it would be a forfeiture. So if one be ſeiſed of ſome lands in fee, and poſſeſſed of other lands for years, all in one pariſh, and he grant all his lands in that pariſh (without naming them) in fee ſimple, or for life; by this grant ſhall paſs no more but the lands he hath in fee ſimple. So if a man have a houſe, wherewith there hath been copy hold land, and other land, uſually occupied; and he let this houſe and all his land thereunto belonging; in this caſe, and by this demiſe, the copy hold land doth not paſs; for in both theſe caſes then there would be a forfeiture. But otherwiſe by theſe words all the land in both caſes would paſs.

Co. ſuper Lit. 112.

7. That if there be two clauſes or parts of the deed repugnant the one to the other, the firſt part ſhall be received, and the latter rejected, except there be ſome ſpeciall reaſon to the contrary; and therefore herein a deed doth differ from a will, for if there be two repugnant clauſes in a will, the firſt ſhall be rejected, and the latter received (1).

4 El. the Biſhop of Ely's caſe.

8. That that which is generally ſpoken, be generally underſtood; unleſs it be qualified by ſome ſpeciall ſubſequent words, as it may be: for if one be ſeiſed of a manor wherein there is a park, and he grant the manor with the cuſtody of the park; by this the park will not paſs.

Co. ſuper Lit. 42.

9. That if the words may have a double intendment, and the one ſtandeth with law, and the other is againſt law, that it be taken in that ſenſe which is agreeable to law: and therefore if tenant in tail make a leaſe of land to *B.* for term of life, and do not mention for whoſe life it ſhall be; this ſhall be taken for the life of the leſſor, and not for the life of the leſſee, as it ſhall be if ſuch a leaſe be made by tenant in fee ſimple.

9 Ed. 4. 4.

10. That things doubtfully ſet down, be applied to him to whom they do properly belong: as if *I. S.* make a feoffment to one of his own name, and there is a covenant in the deed that *I. S.* ſhall deliver the deeds, this ſhall be taken of *I. S.* the feoffor, and not *I. S.* the feoffee.

Co 9. 48. 1c. 143.

11. That ſuch a conſtruction be made of abbreviations, as the deed may not loſe its force: as if one grant *tot' ill' Maner' de D. & C.* if it be but one manor, the words ſhall be taken for *totum illud manerium*; if two manors, then it ſhall be taken for *tota illa maneria*. And here note that moſt of all theſe rules run through all the caſes of expoſition hereafter following (2).

Fit. Grant. 41 Plo. 317. Co. 5. 12. 22 aſſ. Pl. 61. Perk. Sect. 110.

*‡ Touching things granted, theſe rules are firſt to be known.

1. When any thing is granted, all the means to attain it, and all the fruits and effects of it, are granted alſo, and ſhall paſs *incluſive*, together with the thing, by the grant of the thing

* P. 89.

‡ The expoſition of the ſeverall parts of the deeds of grant. And how the words and ſentences therein ſhall be taken. 1. In the premiſſes, and what doth paſs by the grant of a thing.

(1) Which is owing to the different natures of the two inſtruments; for the firſt deed, and the laſt will, are moſt available in law, *Hard.* 94. 1 *Vern.* 30. but different opinions having been formed of the operation of repugnant clauſes in a will, thoſe opinions are conſidered, and the authorities relating to them collected, by the Editor of the 13th. edition of *Co. Lit.* in *note* 1. 112. b. and in the margin of the laſt edition of *Plow.* 541. See further how *deeds* are to be expounded, where there appears to be a repugnancy in the words of them, in *Bac. Abr.* Grants (I).

(2) Further as to rules for the conſtruction of deeds, and wills, ſee *Plow.* 160. *Lilly's Prac. Conv.* 152. *Finch's Law*, 58. The rules of property, rules of evidence, and rules of interpretation, are, or ought to be, in Courts both of Law and Equity, exactly the ſame; both ought to adopt the beſt, or muſt ceaſe to be Courts of Juſtice. 3 *Bl. Com.* 434.—A Court of Equity is as much bound by *poſitive rules* and *general maxims* concerning property, as a Court of Law is, *per* Ld. *Mansfield* in 2 *Burr.* 1108; where the rules of conſtruction are fully diſcuſſed. — The conſtruction does not vary with the court. It is the different ſubject matter of the limitation, which occaſions the alteration in the conſtruction of it, and will occaſion the ſame difference of conſtruction even in the very ſame court. See *Fearne.* on *Cont. Remainders* 3d edit. 93. In the conſtruction of *ancient grants and deeds*, there is no better way of conſtruing them, than by uſage, and *contemporanea expoſitio* is the beſt way to go by, *per* Ld. *Hardwick*, 3 *Atk.* 577.

itſelf, without the words *cum pertinentiis*, or any ſuch like words. *Cuicunque aliquid conceditur, conceditur etiam & id ſine quo res ipſa non eſſe potuit.* As by the grant of conuſance of pleas, is granted the ordinary proceſſe to bring cauſes to judgment. By the grant of a ground, is granted a way to it (1). By the grant of trees is ganted withall power to cut them down and take them away (2). By the grant of mines, is granted power to digg them: and by the grant of fiſh in a man's pond, is granted power to come upon the banks and fiſh for them (3).

2. The incident, acceſſary, appendant, and regardant, ſhall in moſt caſes paſs by the grant of the principall, without the words *cum pertinentiis*, but not *è converſo*; for the principall doth not paſs by the grant of the incident, *&c.* *Acceſſorium not ducit, ſed ſequitur, ſuum principale.* And therefore by the grant of a reverſion without naming the rent, a reverſion after an eſtate tail, for life, or years, and the rent reſerved upon the eſtate, will paſs, ſo as the tenant atturn to the grant: but by the grant of the rent the reverſion will not paſs. So by the grant of a manor, the Court Baron thereunto belonging will paſs; by the grant of a houſe, or ground, the ways thereunto belonging do paſs; by the grant of arable land, the common appendant thereunto will paſs; by the grant of mills, the waters, flood gates, and the like that are of neceſſary uſe to the mills do paſs; by the grant of a houſe, the eſtovers appendant thereunto will paſs; by the grant of a manor, the advowſons appendant, and villaines regardant thereunto, paſs; by the grant of a faire, the Court of Piepowders will paſs; by the grant of homage, or rent, the fealty will paſs; and by the grant of eſcuage, homage and fealty will paſs. But divers things that by continuall enjoyment with other things are only appendant to others, as warrens, leetes, waifes, eſtraies, and the like, theſe will not paſs by the grant of thoſe other things; and therefore if one have a warren in his land, and grant the land, by this the warren doth not paſs. And yet if in theſe caſes, he grant the land *cum pertinentiis*, or with all the profits, priviledges, *&c.* thereunto belonging; by this grant perhaps theſe things may paſs. And here know, that a reverſion may be parcell of, or appendant to, a thing in poſſeſſion, and paſs by the grant of it; but a poſſeſſion cannot be parcell of, or appendant to, a thing in reverſion. And therefore if one make a leaſe for life of a manor, excepting twenty acres of it, and after grant the reverſion of the manor; by this grant the twenty acres will not paſs. So if one be diſſeiſed of an acre, parcell of a manor, or of common appendant to the manor, and before an entry or recontinuance of * the acre, or common, he grant the manor to a ſtranger; by this the acre of land, or common, will not paſs: but otherwiſe it is in caſe where a leaſe for years only is made of, a parcell of the manor. And if a leaſe be made for life, of twenty acres, parcell of a manor, and after the manor itſelf is granted; by this the reverſion of the twenty acres is granted and will paſs alſo.

Co. ſuper Lit. 152. Lit. Sect. 572. 229. Co. 4. 86. 87. 8 H. 7. 4. Bro. Grant. 86. 144. 43 Ed. 3. 22. Co. 10. 64. Co. ſuper Lit. 307.

38 H. 6. 38. Co. 11. 47. 50 Plow. 103. Bro. Grant. 60. 129. Co. i. 7. a 8.

* P. 90.

(1) By operation of law; as if a man grants a piece of ground in the middle of his, he at the ſame time impliedly grants a way to come at it, and the grantee may croſs his land for that purpoſe without treſpaſs; and if the grantee is obſtructed, he has a remedy by action of aſſize of nuiſance, or on the caſe. F. N. B. 183.

(2) And you may come with carts over my land to carry them away. 11 *Co.* 52. a.

(3) And he may juſtify doing ſo; but he cannot juſtify the digging a trench to let the water out to take the fiſh, for he may take them by nets, and other devices; but if there were no other means to take them, he might dig a trench. *Finch*'s Law 63.

And

And if a man make a feoffment in fee of an acre of land parcell of a manor, and after repurchaſe it, and then grant the manor; this acre will not paſs by this grant; for it is not united by the new purchaſe. But it is otherwiſe of trees; for if a man make a leaſe for life of a manor, or other land, excepting the trees, and after grant the reverſion of the manor, or land, to another; hereby the trees do paſs. And if a man make a feoffment in fee of a manor, excepting the trees; and after, the feoffee buy the trees, in this caſe the trees are united again, ſo that if the feoffee ſell the manor, the trees ſhall paſs with it. If I leaſe an acre of land to which an advowſon is appendant, for term of life, reſerving the advowſon, and after do grant the reverſion of that acre with the appurtenances; hereby the advowſon doth not paſs (1). But if I grant the advowſon for term of life, reſerving the acre, and after grant the acre, with the advowſon, *cum pertinentiis*; by this the advowſon doth paſs. If land be appendant to an office, there by grant of the office with the appurtenances, the land will paſs without livery of ſeiſin. And if an office be appendant to land, there by the grant of the one, the other will paſs. 3. That which is parcell or of the eſſence of a thing, albeit at the time of the grant it be actually ſevered from it, doth paſs, by the grant of the thing itſelf. And therefore by the grant of a mill, the milſtone doth paſs, albeit at the time of the grant it be actually ſevered from the mill. So by the grant of a houſe, the doors, windows, locks, and keys, do paſs as parcell of it, albeit at the time of the grant they be actually ſevered from the houſe. 4. By the grant of the land, or ground itſelf, all that is *ſupra*, as houſes, trees, and the like is granted; for *Cujus eſt ſolum, ejus eſt uſque ad cælum*; alſo all that is *infra*, as mines, earth, clay, quarries, and the like (2). And by the grant of a houſe, the ground whereon it doth ſtand doth paſs. 5. When any matter of intereſt, or profit, is granted, the grant ſhall be taken largely: but when any matter of eaſe, or pleaſure only, is granted, as a walk, or the like, the grant ſhall be taken ſtrictly. 6. When a man doth grant all his lands, or all his goods; by this grant doth paſs not only what he is ſole ſeiſed, or poſſeſſed of, but alſo what he is jointly ſeiſed, or poſſeſſed of, with another (3). And ſo *e converſo*. If two men joyn together and grant all their lands, or all their goods; hereby do paſs not only all they have joyntly and together, but all thoſe they have ſole and apart. 7. Some words in * deeds are large, and have a general extent; and ſome have a proper and particular application; the former ſort may contain the latter; as *Dedi*, or *Conceſſi*, may amount to a grant, a feoffment, a gift, a leaſe, a releaſe, a confirmation, a ſurrender: and it is in the election of the party to whom the deed is made, to uſe it to which of theſe purpoſes he will. And hence it is, that if a Lord by the words of *Dedi & conceſſi* grant to his tenant that doth hold of him, his rent; or one

14 H. 8. 25. Co. 11. 50.

14 H. 8. 1. Co. ſuper Lit. 4.

12 H. 7. 25.

Plow. 289. 19 H. 6. 4.

Co. ſuper Lit. 301. Lit. Sect. 543, 544.

* P. 91.

(1) When an advowſon ſhall *be appendant*, or *in groſs*, ſee in *Com Dig.* Advowſon (B). and further what ſhall be deemed to paſs as appendant, appurtenant, or incident, in *Bac. Abr.* Grants (I. 4).

(2) Land being *Nomen generaliſſimum*; whereas by the name of a meſſuage, caſtle, or the like, nothing will paſs but what falls with the utmoſt propriety under the term made uſe of. *Co. Lit.* 4. a.

(3) Where a man grants *all his goods and chattels*, not only thoſe paſs wherein he is jointly poſſeſſed with another, as an obligation wherein he is joint obligee; but thoſe alſo which he is poſſeſſed of in right of another, as a term of years, which he has in right of his wife, or goods which he has as executor. *Roll. Abr.* 58. Graunts (X). 1 *Leon.* 263.

that

that hath a rent charge out of land, doth grant it to the tenant of the land; in theſe caſes the rent is extinguiſhed, albeit it be by way of grant. But a releaſe, ſurrender, confirmation, &c. cannot amount to a grant, &c. nor a ſurrender to a confirmation or a releaſe, &c. becauſe theſe be proper and peculiar manner of conveyances, and are deſtinated to a ſpecial end.

The terms, whereby things are granted, expounded.

Amongſt words whereby things do paſs, ſome are collective, compound, or general, comprehending many things, as hereditaments, lands, tenements, honors, iſles, villages, and the like, including lands of ſeveral ſorts and qualities. And ſome words are ſimple or particular, as meadow, paſture, wood, moor, and the like. Co. ſuper Lit. 5, 6. Co. 4. 88.

Hereditament.

The word [hereditament] is of as large extent as any word, for whatſoever may be inherited, be it corporeal or incorporeal, real, perſonal, or mixt, is an hereditament. By the grant therefore of all hereditaments, do paſs honors, iſles, caſtles, ſeigniories, manors (1), meſſuages, lands, meadows, paſtures, woods, moors, mariſhes, furſes, heaths, reverſions, commons, rents, vicarages, advowſons in groſs, and the like things, which the grantor hath in fee ſimple at the time of the grant, whether he hath it by purchaſe or deſcent (2). Co. ſuper Lit. 6. 16. Perk. Sect. 114, 115. 11 H. 6. 22.

Tenement.

And the word [tenement] is of large extent alſo, and it ſeems doth comprehend as much as the former. And therefore by the grant of all tenements, will paſs, as much, as by the grant of all hereditaments (3). Bro. Grant. 143. Co. ſuper Lit. 6. Perk. Sect. 114.

Land.

The word [land] ſtrictly doth ſignifie nothing but arable land; but in a larger ſenſe it doth comprehend any ground, ſoil or earth whatſoever. And therefore by the grant of all lands, do paſs arable lands, meadows, paſtures, woods, moors, waters, mariſhes, furſes, heath, and ſuch like, and the caſtles, houſes, and buildings thereupon; but not rents, advowſons, and ſuch like things. Alſo by grant of any land in poſſeſſion, the reverſion thereof will paſs. And yet by the grant of a reverſion of land, the land in poſſeſſion will not paſs. Co. ſuper Lit. 4. Co. 4. 891. Perk. Sect. 114. Co. 11. 47. 50. 10. 107.

Note.

But here it muſt be obſerved, that in caſes of grants, and gifts of all hereditaments, tenements, or lands, conſideration is had of the eſtate of the grantor: for if a man be ſeiſed of ſome lands in fee, and have other lands for life, or years, only, and all theſe are lying within one pariſh, and he grant all his lands, tenements, or hereditaments in this pariſh, to another in fee ſimple, fee tail, or for life, * and give livery of ſeiſin in the lands whereof he is ſeiſed in fee, in the name of all the reſt; by this doth paſs no more but his lands whereof he is ſeiſed in fee; for otherwiſe it would be a forfeiture for thoſe lands. But if the livery of ſeiſin be made in any part of the lands he hath for life or years, then that part wherein the livery is made will paſs, and no more. And if the conveyance be by bargain and ſale, and deed inrolled, then the lands whereof he is ſeiſed in fee ſimple, and for life, ſhall paſs, and not the land he hath for a term of years. And yet if in this caſe the Edw. caſe Mich. 9. Jac. Curia 9 H. 7. 25. Bro. Grant. 87. 11 H. 6. 22.

Forfeiture.

* P. 92.

(1) There is no queſtion but a manor may paſs by the word hereditament, *per Ld. Hardwicke*, in *Norris* and *Le. Neve*. 3 *Atk*. 82.

(2) Therefore an heir loom, tho' neither land nor tenement, but a mere movable, yet being inheritable, is comprized under the general word hereditament; and a *condition*, the benefit of which may deſcend to a man from his anceſtor, is alſo an hereditament. 3 *Co*. 2.

(3) This deſcription of the word tenement does not agree with *Ld. Coke* in 1 *Inſt*. 6. a. where he ſays tenement is a large word to paſs land, &c. but hereditament is the largeſt.

grant be for years, then all the lands will paſs, for then there will be no forfeiture in the caſe. Howbeit it is ſaid in *Bro. done* 41. *pro lege*. That if a man give or grant all his lands and tenements in *B*. by this, leaſes for years do not paſs, and that theſe words do intend franktenements at the leaſt (1). Forfeiture.

Co. ſuper Lit. 5. These words [*Honor*, *Iſle*, and *Commote*] are compound words and of large extent. And therefore, by the grant of them, may paſs one or more ſeigniories, manors, and divers other lands. Alſo a caſtle may contain one or more manors. And therefore by the grant of a caſtle, may paſs one or more manors. And ſo ſometimes *è converſo* a caſtle may paſs by the grant of a manor. But by a caſtle moſt commonly is ſignified no more but the houſe or building, and the parcel of ground incloſed wherein it doth ſtand (2). Honor. Iſle. Commote. Caſtle.

Plow. 169.

Co. ſuper Lit. 5. Plo. 168. This word [village or town] is of large extent alſo. And by the grant of it, a manor, land, meadow, and paſture, and divers ſuch like things may paſs. Town or village.

Co. ſuper Lit. 5. 58. Perk. ſect. 116. Co. 5. 11. Plow. 168. Dyer 233. 14 H. 8. 1. 9 Jac. B. R. Dier 30. 8 H. 7. 4. a Bainton's caſe, M. 9. This word [manor] is a word of large extent, and may comprehend many things. And therefore by the grant of a manor, without the words of *cum pertinentiis*, do paſs demeſnes, rents, and ſervices, lands, meadows, paſtures, woods, commons, advowſons appendant, villains regardant, courts baron, and perquiſites thereof, that are in truth at the time of the grant parcel of the manor. [a] But nothing that in truth is not parcel of the manor, albeit it be ſo reputed, will paſs by the grant of the manor; and therefore if one have a manor, and after purchaſe the lawday (3), or a warren to it, and then he grant away the manor, hereby the lawday, or the warren, will not paſs. And yet if by union time out of mind, they have gotten a reputation of appendancy, perhaps by the grant of the manor *cum pertinentiis* theſe things may paſs. [b] By the grant of a manor, alſo divers towns may paſs. An honor alſo may paſs by this name. And ſo alſo may a caſtle, or a hundred. And one manor alſo, that is parcel of another manor, may paſs by the grant of that manor, whereof it is parcel. Manor.

b Co. ſuper Lit. 5. 26. Aſſ. Plo. 54. 2 E. 3. 36.

Co. ſuper Lit. 5. Plo. 168. 17 E. 3. The word [knights-fee] is a compound word alſo, and may comprehend many things. And therefore by the grant of this may paſs land, meadow, and paſture, as parcel of it. And ſometimes * by this, doth paſs ſo much land as to make a knights fee. And ſome ſay it doth contain eight hides of land (4). And it ſeems alſo that a manor may paſs by this name, if it be uſually called ſo. * P. 93.

Co. ſuper Lit. 5. Plow. 167. The word [grange] is a compound word alſo, and by the grant of a grange, will paſs a houſe, or edifice, not only where Grange.

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(1) *A*. poſſeſſed of lands for a term of 999 years, did for valuable conſideration, by leaſe and releaſe, *grant, bargain, ſell and demiſe, to truſtees* and their heirs, to the *uſe of himſelf and his wife for their lives, and the life of the ſurvivor of them*, remainder to the *heirs of the wife*, and covenanted *that he was ſeiſed in fee*, the wife died without iſſue, having made a writing *in the nature of a will*, and deviſed the premiſes to *B*. and his heirs. *Ld. Chancellor* was of opinion, that though the ſettlement could not operate as a leaſe and releaſe, yet *A*. being in poſſeſſion, and the word "granted" being in the releaſe, it took effect as *a grant or aſſignment of his whole intereſt at common law*: and tho' it would not go to the heirs of the wife, yet it ſhould go *to her adminiſtrator* it being clearly the huſband's intention to diveſt himſelf of *all his intereſt in the eſtate*. *Marſhal* v. *Frank. Gilb. Eq. Rep.* 143. *Prec. in Chan.* 480. S. C.

(2) See accordingly 2 *Inſt.* 31. and further as to a caſtle, in *Mad. Baron. Anglic.* 17.

(3) *Lawe-day, alias dicitur de viſu franci plegii; vulgo leta: alias de curia comitatus, juxta ſtat. An.* 1 Edw. 4. ca. 2. Spel. Gloſſ. This law-day or lage-day was properly any day of open court, and commonly uſed for the more ſolemn courts of a county or hundred. *Cow. Interp.*

(4) In different ages a knights fee was eſtimated at ſeveral values, 2 *Inſt.* 596. See further *Cow. Interp. voc.* Knights fee. *Co. Lit.* 69. a. and *Mad. Baron. Angl.* 31, 183.

corn is ſtored up, like as in barns, but neceſſary places for huſbandry alſo, as ſtables for hay, and horſes, and ſtables and ſties for other cattle, and a curtilage, and the cloſe wherein it ſtandeth, at the leaſt. And where land, meadow, and paſture, *&c.* belonging to ſuch houſes are called all together by the name of a grange, there perhaps by this word the whole may paſs.

Farme. The word [farme or ferme] called in Latine *firma*, is alſo a compound word, and doth comprehend many things. And therefore by the grant of a ferme, will paſs a meſſuage and much land, meadow, paſture, wood, *&c.* thereunto belonging, or therewith uſed: for this word doth properly ſignifie a capital, or principal meſſuage, and a great quantity of demeſnes thereunto appertaining. Alſo by the grant of all farmes, or all ferms, it ſeems leaſes for years do paſs. Co. ſuper Lit. 5. Plow. 195. Bro. Grants 155.

Oxgange of land. The word (oxgang) is a collective word alſo, for by the grant of *unam bovatam terræ*, or of an oxgang of land, may paſs land, meadow, and paſture, and it doth properly intend as much as an oxe can till. And *Jugum terræ*, or half a plow-land, is as much as two oxen can till, and by the grant of half a plow-land, may paſs meadow, and paſture. Co. ſuper Lit. 5.

Half a plow land.

A plow land or a hide of land. The words [plow-land, and a hide of land] are *Synonyma*, and are collective words alſo. And therefore by the grant of *Carucatam* or *Hidam terræ*, or of a plow-land, or of a hide of land, may paſs 100 acres of land, meadow and paſture, and the houſes thereupon; but it doth properly intend as much land as one plow can till in a year. Co. ſuper Lit. 5. Plow. 167.

A yard of land. Half a yard land. This word [a yard-land] is alſo collective, and doth comprehend many things, but it is not certain; for in ſome countries it doth contain twenty acres, and in ſome countries twenty-four acres, and in ſome countries thirty acres; by the grant therefore of *virgatam terræ*, or a yard land, will paſs that quantity of land, meadow and paſture that is called by this name. And ſo by the grant of half a yard, or a quarter of a yard land (1). Co. ſuper Lit. 5.

Fold courſe. The word [Fold courſe] is alſo compound, for by the grant of a fold courſe, lands and tenements may paſs, *Et ſic de ſimilibus*. And finally by the grant of any ſuch compound thing as before, for the moſt part there doth paſs thereby ſo much as in common reputation is accounted part of that thing and is uſually called by the name (2). Co. ſuper Lit. 6. Plow. 167.

Parſonage, rectory, vicarage. By the grant of a rectory or parſonage will paſs the houſe, the glebe, the tithes, and offerings belonging to it. And by the grant * of a vicarage will paſs as much as doth belong unto it, as the vicarage houſe, *&c.* 8 H. 7. 1. Bro. Grant. 86.

* Page 94.

Meſſuage. Curtilage. By the grant of a meſſuage, or a meſſuage with the appurtenances, doth paſs no more than the dwelling houſe, barn, dove-houſe, and buildings adjoining, orchard, garden, and curtilage, *i. e.* a little garden, yard, field, or piece of void ground lying near and belonging to the meſſuage, and houſes adjoyning to the dwelling houſe, and the cloſe upon which the dwelling houſe is built, at the moſt. And ſo much alſo may paſs by the Plow. 85. 15. 171. 178. 569. Lit. Bro. Sect. 31. 185. C. ſuper Lit. 5. Co. 10. 65. Kelw. 57. 27 H. 6. 2.

(1) There are no certain number of acres contained in a hide or plough land, or yard land, or an oxgang of land. *Co. Lit.* 69. a. 2 *Inſt.* 596.

(2) As to the dimenſions of land in England, ſee the books referred to in *note* 11. to *Co. Lit.* 5. a. 13th edit. and if the reader is deſirous to inveſtigate the etymologies of the ſeveral words, by which things will paſs in conveyances, he will find the proper books pointed out, in *note* 3 to *Co. Lit.* 6. a. 13th edit.

grant of a houſe. So that the quantity of an acre of ground, or thereabouts, in orchard, garden, and out-let, may paſs by either of theſe names; but more than this will not paſs by the grant that is made in either of theſe words, albeit more have been occupied with it, and albeit more be intended to be paſſed by the grant. And therefore if there be a meſſuage or dwelling houſe, and divers acres of land thereunto belonging, called all together by the name of Hedges, and a grant is made by theſe words, of all that meſſuage with the appurtenances commonly called by the name Hedges; by this grant nothing ſhall paſs but the meſſuage, garden, and curtilage. [a] And yet if a manor, or farme, be commonly called by the name of a meſſuage, there by the grant of a meſſuage the whole manor, or farm, may paſs. [b] And by the grant of a meſſuage, or houſe, and all the lands thereunto appertaining, will paſs all the land uſually occupied therewith. Alſo by the name of a meſſuage, a chappell, or an hoſpitall, may be granted.

a See before.

b Lit. Bro. Sect. 189. 160. Bro. Leaſes 55. Plow. 170. c 13 Aſſ. Pl. 2. Co. ſuper Lit. 4.

Cottage.

By the grant of a cottage, doth paſs a little dwelling houſe that hath no land belonging to it.

Arable land, meadow, paſture.

By the grant of all a man's arable land, there doth paſs no more but that kind of land: and by the grant of all a man's meadow ground, or all a man's meadows, doth paſs no more but that kind of ground. And by the grant of all a man's paſture, doth paſs no more but the land or ground it ſelf imployed to the feeding of beaſts, and alſo ſuch paſtures and feedings as he hath in another man's ſoil.

Wood trees.

14 H. 8. 1. Perk. ſect. 116. Co. 5. 11. Br. Done 14.

If a man have divers acres of pieces of wood, and grant to another *omnes boſcos ſuos*, or all his woods, or all his woods growing in ſuch a place; by this grant doth paſs all the high-wood and underwood, and not only the wood growing upon the land, or ſoil, but the land or ſoil itſelf wherein it doth grow. But in this caſe if the grantor have in the ſame place divers pieces of wood, and divers cloſes, wherein there are divers trees growing in the hedges; it ſeems in this caſe theſe trees in the hedges ſhall not paſs by this grant in theſe words; eſpecially if the caſe be ſo that the cutting of them will be a waſte. And yet if the grantor have no pieces or groves of wood in the place, nor trees but what are growing in the hedges and grounds, in this caſe it ſeems all the trees, except the apple trees, do paſs, but not his hedges and hedge rows. And in * caſe where the trees only do paſs, as where the grant is of all a man's trees, there ſhall paſs no more of the ſoil but ſo much as ſhall ſerve for the nutriment of the trees, and the owner of the ſoil ſhall have the graſs growing thereupon alſo. If a man grant to another all his ſaleable underwoods within his manor, which have been uſually ſold by the owners of the manor, with free entry, egreſs, and regreſs, for ſelling, making, and carrying the ſame away at all times convenient; in this caſe it ſeems the ſoil doth not paſs but the wood only. And yet if thoſe words with free entry, *&c.* be omitted, *contra*.

Co. 5. 11. 11. 50.

* P. 95.

Curia Hill. 16 Jac. B. R. Pinchcomb's caſe.

Dier 374. Co. 11. 48.

If one demiſe, grant, and to term let, a farm with all manner of timber-wood, underwood, and hedge rows, except the great oaks in ſuch a cloſe, to have and to hold the farm for twenty one years; in this caſe, albeit there be the word grant, and that the trees be not named again in the *Habendum*, yet the other trees do not paſs by this grant, otherwiſe than in other leaſes, and if the leſſee cut any timber to ſell, it is waſte in him.

Toft.

A toft is a place where a meſſuage hath ſtood, and by this name in a grant ſuch a thing will paſs.

Bruera. Fraſſetum. Alnetum. Salicetum Selda. Filicetum. Fraxinetum. Lupulicetum. Arundinetum. Roncaria. Juncaria, Ruſcaria, Mariſcus. Mora.

Bruera is a heath, or heathy ground. *Fraſſetum* is a wood or piece of ground that is woody. *Alnetum* is a wood of elders, or place where elders grow. *Salicetum*, a wood of willows, or place where willows grow. *Selda*, a wood of ſallows, willows, or withies, or place where ſuch things grow. *Filicetum* is a braky ground, or place where ſuch things as fern grow. *Fraxinetum*, a wood of aſhes, or place where aſhes grow. *Lupulicetum*, a hopyard, or place where hops do grow. *Arundinetum*, a place where reeds grow. *Roncaria* or *Runcaria*, a place full of bryars or brambles. *Juncaria* or *Joncaria* or *Siampna* (which are all one) a place where ruſhes do grow. *Ruſcaria*, a place where kneeholm, or butchers pricks, or broom doth grow. *Mariſcus*, a fen or marſh ground. *Mora*, a more barren and unprofitable ground than a marſh. And by grant of theſe, and ſuch like things, or of twenty acres of ſuch ground, theſe particular kinds only or ſo many acres thereof do paſs. *Vacaria*, is a dairy-houſe. *Porcaria*, a ſwineſty. *Bercaria*, a tanhouſe: and by theſe names theſe things will paſs. By the name of *Stagnum* a pool, or *Gurges* a gulf, the water, land, and fiſh in the water will paſs.

Co. ſuper Lit. 4. 5.

Vicaria Porcaria. Stagnum. Gurges.

Co. ſuper Lit. 5.

Stadium. Ferlingus. Quarentena terræ. Selio terræ.
Acre of land.
Rood of land.

By the grant of *Stadium*, *Ferlingus*, or *Quarentena terræ*, doth paſs a furlong or furrow long, which anciently was the 8th part of a mile. By the name of *ſelio* or *porca terræ*, doth paſs a ridge of land, which is ſometimes longer, and ſometimes ſhorter. By the grant of an acre of land, doth paſs ſo much as is an acre by meaſure in that country, by the ordinary account and meaſure of the country. By the grant of a rood of land, doth paſs ten pearches * the fourth part of an acre. And by the grant of ſix foot in length and two foot in breadth, ſo much only doth paſs. And by theſe, and ſuch like names, land may be granted.

Co. idem.

* P. 96.

Mines.

By the grant of *Mineras* or *Fodinas plumbi*, &c. or mines of lead, *&c.* the land itſelf will paſs, if livery of ſeiſin be made thereof; but otherwiſe it ſeems not, and then the grantee hath by the grant a power to dig only, granted unto him.

Co. ſuper Lit. 6. Co. 5. 12.

Trench.

If one grant to me to dig a trench in his ground, from ſuch a place to ſuch a place, to convey water by a lead pipe, or otherwiſe; hereby alſo *incluſive* is granted a liberty at any time after to dig to amend it as occaſion ſhall be.

Perk. Sect. 111.

Turfs.

If one grant to me to dig turfs in his land or ſoil, and to carry them away at my will and pleaſure; by this is not granted the land itſelf, the houſes or trees thereupon, or mines therein.

Co. ſuper Lit. 4.

Common.

If one grant to another, common for all his beaſts in his land; hereby is not granted common for goats, pigs, and ſuch like beaſts and cattle that are not commonable. But if the grant be of common for all manner of beaſts, *contra*. And if one grant to another, common without number in his land, the grantor is not hereby excluded to common there with the grantee.

Co. ſuper Lit. 4. Perk. Sect. 108. 109.

And if one grant to me, common of paſture for ten kine in his lands in *Dale*; by this grant I ſhall have common in his commonable grounds and lands only, and not in any other lands. And if a man grant common of paſture to me, for my beaſts *ubicunque averia ſua ierint*, and he occupy 100 acres of land with his beaſts, and after he keep no beaſts; yet by this

grant I may keep my beasts in those 100 acres. But if he grant to me common of pasture for my beasts wheresoever his cattle shall go, &c. by this grant I shall have no common but when the grantor doth use his common with his cattle, &c.

Perk. Sect. 116. By the grant of estovers, will pass, housebote, hayboote, and plowboote. But if a man grant to me estovers out of his manor, I may not by this grant cut down any of the fruit trees within his manor (1). Estovers.

14 H. 8. 1. a Clar. case Trin 5. Jac. B. R. If land be granted to me; hereby also implicitely is a way thereunto granted to me also. [a] So that if one have twenty acres of land, and grant me one acre in the midst of it, hereby *inclusive* there is granted me a way to it. [b] And yet if a man have two closes, and he use to go over one of them for his ease, to the other close, by a new way, and after he grant the further close *cum pertinentiis*; by this grant the new way doth not pass. Way.

b per. Williams & Yelverton Justices. Mic. 3. Jac.

Co. super Lit. 5. Rice & Wiseman's case. Mich. 9. Jac. If a man have a forest, park, chase, vivary, or warren in his own ground, and he grant this forest, park, chase, vivary or warren; hereby not only the priviledge, but the land itself doth pass. But if the ground be anothers; or if it be his own, and the grant * be only of the game, &c. in these cases, the land, or soil itself, will not pass. Forest, park, chase, warren.

* P. 97.

Co. super Lit. 4. If a man be seised of a river, and by his deed doth grant *separalem piscariam*, or *aquam suam* in the same, and maketh livery *secundum formam chartæ*; by this grant doth pass only a liberty to fish within the water, and not the soil, nor the water itself: and therefore the grantor may take water still; and if it be dry, he may take the soil also. And if one grant all his fish in his pond; by this is granted a power to come and fish for them; but the grantee may not hereby dig a trench and let out the water to take the fish, albeit they may not be otherwise taken (2). Fishing.

Fitz. Barre 237.

Co. super Lit. 4. Dier 285. Trin. 5. Jac. B. R. accord'. If one be seised of twenty acres of land, and he grant to another and his heirs the vesture, or the herbage of it, and maketh livery of seisin in it *secundum formam chartæ*; by this grant do pass the corn, grass, underwood, sweepage, and the like; and for these things the grantee may have an action of trespass for any wrong done to him in them. But hereby the land itself, the houses, and great trees thereupon, and mines therein, do not pass. And if one grant the herbage, or vesture of a wood; hereby is granted the grass and underwood only, and not the timber of great trees. But if a man, so seised of twenty acres of land, grant to another the profits of this land, to have and to hold to him, and his heirs, and maketh livery *secundum formam chartæ*; hereby the vesture, herbage, trees, mines, and all whatsoever parcels of that land, do pass. Vesture or herbage of land.

Profits of lands.

35 H. 6. 37. If one grant to another all his deeds, or all his muniments; hereby will pass all his charters, feoffments, leases, releases, confirmations, letters of atturney, and the like. Deeds.

Co. super Lit. 118. 39 H. 6. 35. Dier 59. Perk. Sect. 115. If one give or grant to another *omnia bona*, or all his goods; by this do pass all his moveable and immoveable, personal and real goods, as horses, and other beasts, plate, jewels, and houshold stuff, bowes, weapons, and such like; and his money, Goods.

(1) For the nature and different kinds of estovers, see *Co. Lit.* 41. *b.* the same estovers that tenant for life may have, tenant for years shall have.

(2) See before, in page 86, note 3.

and his corn growing on the ground, alſo all the obligations and bills that are made to him, and in his own name, do paſs by this, but not the debts due by ſuch obligations and bills (1). And ſome ſay that leaſes and terms of years of houſes, lands, rents, commons, &c. rents charge for years, wardſhip of tenants in capite, and by knights ſervice, and the intereſts that a man hath by ſtatute ſtaple, ſtatute merchant, or elegit, do paſs by this grant; but of this, others doubt (2). And if a man give or grant to another *omnia catalla ſua*, or all his chattles; hereby doth paſs as much as by the grant of all his goods, and by this without queſtion leaſes for years, *&c.* do paſs. But by neither of the grants do paſs thoſe goods or chattles which the grantor hath by delivery, in keeping for another, or the like. Neither doth any eſtate of inheritance or freehold, or the charters concerning any freehold, paſs under * theſe words, [a] Neither doth any thing in action, as debts or the like, nor hawks, hounds, poppinjays, or the like, paſs by this grant. [b] And yet if an executor grant *omnia bona & catalla ſua*; hereby the goods and chattels he hath as executor, as well as his other goods and chattels, will paſs. And if one grant all his leaſes for years which he hath by any conveyances; hereby the leaſes for years which he hath as executor, as well as other leaſes for years, will paſs.

12 H. 8. 4. Bro. Grant 96. 51. Done 39. 47. Dier 5. Co. 8. 33.

Chattels.

* P. 98.

a Per ch. Juſt. B. R. 21 Jac.

b Adjudged 3 Jac. Kelw. 64. 10. Co. 4. 1. Per Flemming Juſt. 7 Jac. B. R.

Utenſils. If one grant to another all his utenſils; hereby will paſs all his houſhold ſtuff, but not his plate, jewels, or any ſuch like thing.

Dier 59.

Grant of all a man's eſtate, right, &c. If a man be ſeiſed of land in fee ſimple, or for life, and have an eſtate in it for years, by ſtatute merchant, ſtaple, elegit, or the like; and he grant all his eſtate, or all his right, or all his title, or all his intereſt of and in the land; by this grant, all his eſtate, and as much as he is able to grant, doth paſs. And if tenant for life of land, the remainder to the ſtranger in tail, the remainder to the right heirs of the tenant for life, do grant by theſe words; hereby both his eſtates do paſs. And if a tenant in tail grant all his eſtate in the land; hereby there doth paſs as much as he can grant. And all theſe words alſo do carry and paſs reverſions, as well as poſſeſſions. And if a man have a term of years of land, and he grant his term; hereby doth paſs the term of years, and all his eſtate and intereſt of the land.

Co. ſuper Lit. 345. Lit Sect. 613. Plow. 161. Co. 1. 153.

Note. And note, that by all theſe names theſe things may be granted; and that for ſuch things as are grantable without deed, when they paſs by a verbal grant in any of theſe words, the words ſhall have the ſame expoſition as they have in deeds.

Fitz. Brief 581.

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(1) If a man hath an obligation, though he cannot grant the thing in action, yet he may give or grant the deed, *viz.* the parchment and wax to another, who may cancel and uſe the ſame at his pleaſure, *Co. Lit.* 232. b. Money due on bond, is a *choſe in action*, ſo called, becauſe, though the *property* in a debt veſts at the time of forfeiture mentioned in the obligation, yet there is no *poſſeſſion* till recovered by a due courſe of law. A *choſe in action* ſtrictly is not aſſignable at law. *Co. Lit.* 214. 266 a. And after an aſſignment of a bond, if an action is brought on it, it muſt be brought in the name of the obligee: and for this reaſon, the power of attorney, and covenant that the aſſignor (the obligee) will not releaſe, in caſe an action is brought, are inſerted in the aſſignment of the bond. But tho' a *choſe in action* cannot be aſſigned to a common perſon, yet it may to the King, 1 *Pr. Wms.* 252. The King may by his prerogative aſſign a *choſe in action* to *A.* and it will be a good aſſignment; but if *A.* aſſigns it over to any other perſon, that aſſignment will be void, *Cro. Jac.* 180. A Court of Equity however will protect an aſſignment of a *choſe in action*. 3 *Pr. Wms.* 200.

(2) Leaſes for years do not paſs by a *grant* of *Omnia bona*; but otherwiſe in a will, the civil law being the guide; by two judges againſt one, *Cro. Eliz.* 386. *Portman* v. *Willis.*

If

H. 6. If one grant all his goods in ſuch a place *ſi quæ fuerint*; by this grant nothing doth paſs but the goods that are in ſuch a place at the time of the grant, and not any other goods that ſhall be there afterwards.

Bro. Done 10. If two men have goods in common, and have other goods ſeverally, and they give me all their goods, by this grant is given all their goods they have in common, and likewiſe all the goods they have in ſeveralty.

Plow. 171. 140. Co. 10. 106. If two tenants in common, or others ſeverally ſeiſed of land, joyn in the grant of a rent of twenty ſhillings, or a horſe, out of the land whereof they are ſo ſeiſed; by this grant the grantee ſhall have two twenty ſhillings, or two horſes (1).

Bro. Grant 64. If a man grant a rent of ten pound to me, to have and to hold during my life and my wife's life, and after the death of my wife, a rent of three pound to me for my life; in this caſe, if my wife die, I ſhall have both the rents. But if there be any words of reſtraint or determination of the firſt rent, it may be otherwiſe.

Adjudg. M. 20 Jac. B. R. Burton v. Brown. * If one be ſeiſed of a garden plot in the pariſh of *Sale*, and grant it to *B.* for ten years, which being expired, he doth grant his garden plot to *C.* for twenty one years, and *C.* doth build a houſe upon part of it, and leaveth the other part in a garden plot ſtill, and after the twenty one years ended, the leſſor doth grant to *D. totam illam peciam fundi ſive gardin' plott' nuper in tenura de* B. *& nunc de* C. lying in the pariſh of *Sale*, by this grant, the houſe newly built, and the plot of garden doth paſs. * P. 99.

Bro. Grant 53. 88. Done 26. If one grant his manor of *Dale*, in *Dale*, which in truth doth extend into *Dale* and *Sale*; in this caſe no part of the manor that doth lye in *Sale* ſhall paſs. So if one grant all his tenements in *Dale*; hereby none of the tenements in *Sale* will paſs. So if the manor lie within the pariſhes of *A. B.* and *C.* and the grant is of the manor of *Dale*, lying within the pariſhes of *A.* and *B*; by this grant no part of the manor lying in *C.* will paſs. But if one ſeiſed of the manors of *A.* and *B.* in the county of *C.* grant thus, *totum illud Manerium de* A. *&* B. *cum pertin' in com'* C. or *totum illud Manerium de* A. *cum* B. *in com'* C. by theſe grants, in caſe of a common perſon, both the manors will paſs.

Co. 1. 46.

Bro. Grant If one grant all his lands in *Dale*, which he had of the gift of *I. S*; by this grant nothing will paſs but that which he had of the gift of *I. S.* But if one grant all his lands in *Dale*, called Hodges, which he had of the gift of *I. S.* by this grant all that which is called Hodges ſhall paſs, albeit the grantor had it not of the gift of *I. S.*

Dockraies caſe, Paſch. 12 Jac. If one grant all his lands in the occupation of *I. S*; by this grant doth paſs not only ſuch lands as *I. S.* doth occupy by right, but alſo ſuch lands as he doth occupy by wrong, and not only the lands whereof he hath ſome eſtate, but alſo ſuch lands as whereof he hath the paſturage only.

2 Jac. Br. If one grant all his lands in *B.* and elſewhere in the county of *S.* in the tenure of *I. S.* by this grant, nothing doth paſs but that which is in the tenure of *I. S.*

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(1) But if they reſerve twenty ſhillings upon a leaſe, they ſhall have only one twenty ſhillings. *Finch's* law 63. according to the maxim of law, that every mans grant ſhall be taken, by conſtruction of law, moſt forcibly againſt himſelf, *Co. Lit.* 183. a.

If one grant his manor of *S. nec non omnes mariſcos ſuos de* S. *ac omnia terra, tenementa, &c. in* S. *& alibi dict' Maner' ſpectan'*; by this grant the marſh doth paſs, though it be no part of the manor. Adjudged Seignior Wentworth's caſe Co. 1. 46.

If one grant all his demeſne lands of his manor of *Dale, &c.* it ſeems by this the cuſtomary land parcel of the manor, held by copy, doth paſs.

If one be ſeiſed of tythes which did belong to an abby, part of which were gathered by the almoner, and part not, and he grant *omnes & omnimodas decimas granorum, &c. infra dominium prædict' & precinct' ejuſdem, in dict' Comit', ac omnes alias decimas, proficua & commoditates &c. infra dominium predict' & dict' Monaſter' &c. ſpectan' & quæ nuper per Eleemozinar' ejuſdem Monaſterii collect' fuer'*; by this grant ſhall paſs, all the tythes, as well thoſe that were * collected by the almoner, as thoſe which were not, and thoſe words *quæ per Eleemozinar', &c.* ſhall refer only to the laſt, and not to both ſentences. Adjudge Hil. 2 Jac. B. R. Baker's cate.

* P. 100.

If one grant all his lands in *D.* containing ten acres, whereas in truth his lands there do contain twenty acres; by this grant the whole twenty acres will paſs. Dier 80.

If one grant the ſcite of an abby, *& omnia terras prat' paſturas & ſubſcript' cum pertinen' dict' Monaſter' pertinen' &c. viz.* ſuch a thing, and ſuch a thing *&c.* by this grant, the grantee ſhall have all the lands belonging to the monaſtery, and *viz.* ſhall relate to *Subſcript'* only, and not to *omnia*. See more in grant *infra numb.* 4. and in teſtament, at *numb.* 8. and in fine, at *numb.* 3. Dier 70.

In the exception, and how that ſhall be taken:
1. In the thing excepted.

The exception is always taken moſt in favour of the feoffee, leſſee, *&c.* and againſt the feoffor, leſſor. And yet it is a rule, that what will paſs by words in a grant, will be excepted by the ſame words in an exception. And it is another true rule, that when any thing is excepted, all things that are depending on it, and neceſſary for the obtaining of it, are excepted alſo: as if a leſſor except the trees, he may bring his chapman to view them if he deſire to ſell them, and he, or the vendee, may cut them, and take them away. And by ſuch an exception, the leſſor will have the boughs, fruit, herons, and hawks, that breed in them, *&c.* Co. 10. 106. 14 H. 8. 1. 11. 52.

If a man be ſeiſed of a fiſhing from ſuch a place to ſuch a place, and hath a mill upon the water, and he grant *totam partem ſuam piſcariæ de* D. *quatenus terræ ſuæ ſe extendunt, ſalvo tamen ſtagno molendini:* this exception doth not take away the fiſhing of the grantee in the mill pond, but it ſhall have relation only to the pool to repair the mill. Perk. Sect. 646. Fitz, Aſſiſ. 316.

If a man ſeiſed of a manor make a leaſe of it, excepting all the ſaleable underwoods, now growing, or which hereafter ſhall grow on the premiſſes, which have been uſually ſold by the owners of the manor, with free entrie, egreſſe, and regreſſe, for the felling, making, and carrying away of the ſame, at times convenient; in this caſe, the ſoil is not excepted by reaſon of the ſubſequent words. Hil. 16. Jac. B. R. per Judges.

If one be ſeiſed of a manor, and make a leaſe of it *cum pertinen' una cum columbar' ac reddit' tenentium, decimis garbarum, finibus, heriot' perquiſit' Cur' & aliis omnibus proficuis, Advocac' Eccleſiæ & wrecc' except'*, in this, the exception doth begin at *Advocac' Eccleſiæ*, and doth except that alſo which followeth, and no more. Dier 58.

If

Dier. 264. If one grant lands in fee, excepting the trees, or any other thing, to the grantor, without ſaying [and to his heirs;] by this exception, the thing excepted is ſevered only for the life of the grantor, and then it ſhall paſs with the reſt of the things granted. But if the thing be excepted indefinitely, without ſaying [for the life of the grantor, &c.] nor how long, this ſhall be taken to be an exception during the eſtate. 2. In the time.

* The *Habendum*, as all other parts of a deed, for the moſt part, ſhall be taken moſt ſtrongly againſt the grantor, and moſt in advantage of the grantee; yet ſo as withal it ſhall be conſtrued as near the intent of the parties as may be, as in all the caſes following doth appear. * P. 101. In the *Habendum* or limitation of the eſtate, and how that ſhall be taken.

Plow. 557. If land be given, or granted, to one, *habendum*, or to have and to hold, to him and his heirs, ſo long as he pay 20*l.* yearly to *I. S.* and his heirs, or ſo long as ſuch a tree doth ſtand, or the like; this is a kind of fee ſimple, but it is limited and qualified, and determinable upon this contingent. And yet this may become a pure fee ſimple, for if land be granted to one and his heirs, until *I. S.* pay 100*l.* and *I. S.* dye before he pay it, in this caſe the eſtate is become a pure fee ſimple. Fee ſimple.

Co. ſuper Lit. 8, 9. Lit. 1. 27H. 8. 5. Perk. Sect. 239. 240, 241. 39H. 6. 38. Plow. 28. Bro. Eſtates 4. 11 H. 7. 12. Co. ſuper Lit. 15.

If lands be given or granted to a man, to have and to hold to him and his heirs, this is a fee ſimple, pure, abſolute, and perpetual; and this is made by theſe words [his heirs]; for it is a general rule that theſe words [his heirs] only, make an eſtate in fee ſimple in all feoffments and grants. But this rule hath many exceptions: for if feoffment of land be made to *I. S.* & *heredibus*, without the word [*ſuis*] this is a fee ſimple: and yet, if the grant be to *I. S.* and *I. D.* & *heredibus*, without this word [*ſuis*] *contra*, for this is only an eſtate for their lives. And if lands be given to a Biſhop, Parſon, or the like, to have and to hold to him and his ſucceſſors; this is a fee ſimple. And if lands be given to a Mayor and communalty, or other corporation aggregate, generally, without the word ſucceſſors, or any other word, or if lands be given to ſuch a corporation for their lives, this is a fee ſimple. But if land be given to a Parſon, or the like, to have and to hold to him, without ſaying how long; or to have and to hold for life; by this he hath no more but an eſtate for life (1). [a] And if lands be given to the King generally, without any other words; this is a fee ſimple. [b] So if one grant *Deo & eccleſiæ de D*; it is ſaid this is a fee ſimple in the Parſon of *D*. So alſo of a grant *Eccleſiæ de D. per Thirne Iuſt.* So if a grant had been to the Monks of ſuch a houſe, it had been a fee ſimple in the houſe. And in like manner it is in other caſes: [c] as if one recite, that *B.* hath enfeoffed him of white acre, to have and to hold to him and his heirs, and then he ſaith further, that as fully as *B.* hath given white acre to him and his heirs, he doth grant the ſame to *C.* by this *C.* the grantee hath the fee ſimple of this acre. And if one grant two acres to *A.* and *B.* to have and to hold the one to *A.* and his heirs, and the other to *B.* *in forma predicta*; by this *B.* hath a fee ſimple in this other acre; for an eſtate in fee ſimple, fee tail, or for life, may be made by ſuch words

a Co. 6. 27. ſuper Lit. 9.

b 15 Ed. 4. 13. 9 H. 7. 11. 12 H. 8. 9 H. 4. 84. 33 H. 6. 20.

c Co. ſuper Lit. 9 Aſſ. Pl. 2. Plow. 130. 14 H. 4. 35.

(1) See accordingly this diſtinction between a corporation aggregate, and a corporation ſole, in reſpect of the eſtate they reſpectively take, by a grant in which the word ſucceſſors is omitted, clearly explained, in *Co. Lit.* 94. b.

of reference. Alſo if a rent be granted between parceners for to make an equality of partition, and it be granted generally, and without any words of heirs, yet this is a fee ſimple (1).

* P. 102. So where lands are given in *Frankalmoigne* (2). And ſo * alſo it is in the caſes of a releaſe of right, a fine, and a recovery.

If one give or grant land to another, to have and to hold to him and his heirs males, or to him and his heirs females; in both theſe caſes, there is a fee ſimple made; but otherwiſe it is when theſe words are in a will, for then it is but an eſtate in tail only (3). 27 H. 8. 27. Lit. Sect. 31. Co. 11. 46.

If one grant land to one, to have and to hold to him and his right heirs; by this he hath a fee ſimple. And ſo it ſhall be taken if it be by fine. So if one grant land to *I. S.* for life, the remainder to the heirs, or to the right heirs of *I. S.* this is a fee ſimple; ſo if one make a feoffment in fee to the uſe of himſelf for life, and after his death to the uſe of his heirs; this is a fee ſimple. 33 H. 6. 5. Co. ſuper Lit. 22. Co. 1, 95. 66.

If one grant land to *I. S.* to have and to hold to him, and the heirs of *I. S*; this is a fee ſimple, and all one with a grant to *I. S.* and his heirs.

If one grant land to another, to have and to hold to him for twenty years, and that after the twenty years, the grantee ſhall have it to him and his heirs by 10*l.* rent, and give livery of ſeiſin: by this the grantee ſhall have the fee ſimple. 20 H. 6. 35. Co. ſuper Lit. 217.

If one grant land to the wife of *I. S.* to have and to hold to her for life, and after to *I. S.* in tail, and after to the right heirs of *I. S.* by this *I. S.* hath a fee ſimple. And if one grant land to *A.* for life, the remainder to *B.* for life, the remainder to the right heirs of *A*; by this *A.* hath a fee ſimple. Co. 1. 91. Dier 156. Co. ſuper Lit. 22.

If land be granted to a man and his wife, to have and to hold to them, and the heirs iſſuing of them, it ſeems this is a fee ſimple, and not a fee tail. Bro. Eſtates 86.

If land be granted to one and his heirs, by the premiſes of a deed, to have and to hold to him for life; by this he hath a fee ſimple. So if by the premiſes of a deed, land be granted to one and the heirs of his body, to have and to hold to him and his heirs; by this he hath an eſtate tail, and a fee ſimple expectant. And ſo *vice verſa*. If by the premiſes of the deed, the grant be to him and his heirs of his body: by this alſo he hath an eſtate tail, and a fee ſimple expectant (4). Co. 2. 21. 24. ſuper Lit. 21. 21 H. 6. 7.

Fee tail. If lands be given or granted to a man, to have and to hold to him, and to the [or his] heirs of his body, or the [or his] heirs males of his body, or the [or his] heirs females of his body; by this the grantee hath an eſtate tail. So if lands be given to a man, to have and to hold to him and the heirs Terms of Law tit. Tail. Lit. tit. Fee, totus, & in Co. ſuper Lit. 26.

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(1) Becauſe the grantor hath a fee ſimple, in conſideration whereof he granted the rent; *ipſæ etenim leges cupiunt ut jure regantur*, *Co. Lit.* 10. a. *Plow.* 134. b.

(2) For the doctrine of *Frankalmoigne*, ſee *Co. Lit.* 93. b. The ſtatute of 12 *Car.* 2. *c.* 24. does not in the leaſt vary the tenure in *Frankalmoigne*, but expreſsly ſaves it.

(3) For the operation of words in a will, as to what eſtate paſſes by them, whether in fee, in tail, or for life, ſee fully in the chapter on teſtaments.

(4) But according to 8 *Co.* 154. b. the words *heirs of the body*, in the *habendum*, qualify the word *heirs* in the *premiſes*, and create an eſtate tail, without any fee expectant. See alſo *Mo.* 26.—*contra Cro. Jac.* 476. and 2 *Roll Rep.* 23. See more amply, as to what words make an eſtate in fee ſimple, in *Vin. Abr.* Eſtate (R.) (L.) *Com. Dig.* Eſtates (A. 2.) *Bac. Abr.* Eſtate in fee ſimple (B).

males

males, or to him and the heirs females of his body begotten: in both theſe caſes it is an eſtate tail (1).

Lit. idem. Co. 1. 140. Co. ſuper Lit. 20. Co. 7. 41.

If lands be given to a man and his wife, to have and to hold to them and the heirs males, or to them and the heirs females, of their two bodies begotten: by this they both have an eſtate tail. And if lands be given to them, and the heirs males, or heires females, of the body of the huſband begotten on the wife: by this he hath an eſtate tail, and * his wife an eſtate for life only. And if lands be given to *A.* to have and to hold to him and his heirs on the body of *B.* begotten; by this *A.* hath an eſtate tail, and *B.* hath nothing (2). So if lands be given to a man and his wife, to have and to hold unto them, and the heirs which he ſhall beget on her body; by this they have an eſtate tail in them both. If lands be given to a man and his wife, and the heirs of the body of the huſband; by this the huſband hath an eſtate in general tail, and the wife but an eſtate for life. If lands be given to him, to have and to hold to him, and his heirs he ſhall beget on the body of his wife; by this he hath an eſtate tail, and ſhe no eſtate at all.

* P. 103.

Lit. Sect. 17.

If one give his land to his daughter, or couſin, in frank-marriage; by this they have each of them an eſtate tail without any word of [heirs, or heirs of body,] *&c.* (3).

Co. ſuper Lit. 21. Co. 7. 41. 5 H. 5, 6.

If one give lands to *B.* and his heirs, to have and to hold to *B.* and his heirs, if *B.* have heirs of his body, and if he die without heirs of his body, that it ſhall revert to the donor; by this *B.* hath an eſtate tail. So if one give lands to *B.* and his heirs, if he have iſſue of his body; by this he hath an eſtate tail (4). So if lands be given to *B.* to have and to hold to him and his heirs, provided that if he die without heir of his body, the land ſhall revert. So if lands be given to *A. & B. uxori ejus, & hered' eorum, & aliis hered' ipſius A. ſi dict' hered' de dict' A. & B. exeunt' obierunt ſine herede de ſe, &c.* by this they have an eſtate tail. And ſo in all ſuch like caſes, where after a limitation of a fee ſimple, theſe, or ſuch like words are added, *viz.* that if he die without heirs of his body the land ſhall revert; for in all theſe caſes the *habendum* is conſtrued to be a limitation, or declaration, what heirs are meant before (5).

Co. ſuper Lit. 26. Plow. 135.

If lands be given to *A.* and *B.* (a young man and maid unmarried) to have and to hold to them, and the heirs of their two

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(1) It is a conſtant rule, that in the creation of an eſtate in tail, it muſt appear of what body the perſons to inherit muſt iſſue, and it is the eſſence of the eſtate. 1 *Pr. Wms.* 72. *Co. Lit.* 27. b. For the origin and nature of eſtates tail, what things may be entailed, the different ſpecies of eſtates tail, the words neceſſary to create them, the incidents and inconveniencies attending them, and the introduction and progreſs of fines and recoveries in order to bar them, ſee 2 *Bl. Com.* 110. *Co. Lit.* 9, 19. and *Wright's Ten.* 186.

(2) And on the death of *B.* without iſſue, in the lifetime of *A. A.* becomes tenant in tail after poſſibility of iſſue extinct: for the nature of this eſtate and its priviledges, ſee *Co. Lit.* 27. b.

(3) The daughter or couſin takes only an eſtate in ſpecial tail. This gift may be either before, or after, marriage. The words *in frankmarriage*, according to the rules of law, create an eſtate of inheritance in ſpecial tail; but theſe four requiſites muſt be incident to the gift, or elſe thoſe words will create but an eſtate for life. 1ſt. It muſt be given for conſideration of marriage. 2dly. The woman or man, that is the cauſe of the gift, muſt be of the blood of the donor. 3dly. If the gift be made of ſuch a thing as lieth in tenure, the donees muſt hold of the donor at the time of the eſtate in frank-marriage made. 4thly. The donees ſhall hold freely of the donor, till the fourth degree be paſt. *Co. Lit.* 21. b. See further as to the doctrine of frank-marriage in *Fleta. lib.* 3. *cap.* 11. *Com. Dig.* Eſtates (B. 6).

(4) The word *iſſue* in a will, may be a word of limitation; but in a deed, it is always a word of purchaſe 2 *Atk.* 582.

(5) Nor does ſuch conſtruction, or explanation of the *Habendum*, retract the gift in the premiſes, becauſe the word *heirs* has ſtill its operation, and by ſuch conſtruction becomes more conformable to the will and intention of the donor. See *Bac. Abr.* Eſtates in tail (B).

bodies;

bodies; by this each of them hath an eſtate tail, and if they marry their heirs may inherit it.

If lands be given to the ſon, to have and to hold to him, and his heirs of the body of his father; by this the ſon hath a fee-ſimple. But if the words be, to have and to hold to him and the heirs of the body of the father engendred; by this it is an eſtate tail in a deed, as it is in a will. And if the father be dead, the law is ſo alſo; but it ſeems the ſon ſhall have by this only an eſtate for life, except he be iſſue in tail to his father *per formam doni*. So if there be grandfather, father, and ſon, and the father dieth, and lands be given to the ſon, to have and to hold to him, and the heirs of the body of the grandfather; this is an eſtate tail in the ſon: but neither the father, nor the grandfather, have either of them any eſtate in theſe caſes. If lands be given to *I. S.* and the heirs of the body of his wife (being dead) begotten; by this *I. S.* hath an eſtate tail.

Co. ſuper Lit. 7. Co. 8. 87. Aſſ. pl. 47. 5 Aſſ. 14.

Will.

12 H. 4. 1.

* P. 104. * If one grant lands to *I. S.* to have and to hold to him, and the heirs of his body iſſuing, the remainder to *I. D.* and his heirs *in forma predicta*; by this *I. S.* and *I. D.* after him, have each of them an eſtate tail (1).

Co. ſuper Lit. 385.

If one grant lands to *A.* to have and to hold to him for life, the remainder to the firſt ſon of *A.* and the heirs males of the body of that firſt ſon; by this, the firſt ſon hath an eſtate in tail, and *A.* his father but an eſtate for life only. But if lands be granted to *A.* for life, the remainder to the heirs of the body of *A*; by this *A.* hath an eſtate tail in him. And if lands be given to a man and his wife, to have and to hold to them, and one heir of their bodies lawfully begotten, and to one heir of the body of that heir; by this there is an eſtate tail made, yet ſo as it ſhall laſt only during the lives of thoſe two heirs.

Co. 2. 91. ſuper Lit. 22. 39. Aſſ. Plow. 20.

If one grant lands to another, to have and to hold to him and to his heirs of the body of ſuch a woman lawfully begotten; by this he hath an eſtate tail for begotten ſhall be intended by the donee on that woman.

Co. ſuper Lit. 26.

If there be huſband and wife, and they have iſſue a ſon and daughter, and lands are given to the wife, to have and to hold to her, and the heirs of her late huſband on her body begotten; by this the wife hath an eſtate for life, and the ſon an eſtate in tail, and if he die without iſſue, it ſhall go to his daughter, *per formam doni*.

Co. ſuper Lit. 26.

If lands be granted to the huſband of *A.* and wife of *B.* to have and to hold to them, and the heirs of their two bodies; by this they have each of them an eſtate in tail in them; for there is a poſſibility that one huſband and wife may die, and then the other huſband and wife may intermarry.

Co. ſuper Lit. 20.

If there be father and ſon, and lands are given to the father, to have and to hold to him, and the heirs of the body of his ſon; by this the ſon hath an eſtate tail, but the father, as it ſeems, but an eſtate for life.

12 H. 4. 3. Dier 274.

If lands be given to the mother for life, the remainder to her ſon and the heirs of the body of his father on her begotten, (the father being dead) by this the ſon hath an eſtate tail.

Lit. Sect. 352.

If lands be granted to *I. S.* to have and to hold to him, and the heirs he ſhall happen to have of his wife; by this he hath

12 H. 4.

(1) If the remainder had been to *J. D. in forma predicta*, without the word *heirs* being inſerted, this limitation would veſt a good eſtate tail in *J. D.* *Co. Lit.* 20. b.

but

but an eſtate tail, and no feeſimple, and his wife hath no eſtate at all.

Co. ſuper Lit. 20. If lands be granted to *I. S.* and the heirs that the ſaid *I. S.* ſhall lawfully beget of his firſt wife, and he hath no wife at the time of the grant; by this he hath an eſtate tail.

Co. ſuper Lit. 26. If *A.* have iſſue by *B.* his wife, *C.* a ſon, and *D.* a daughter, and *A.* die, and lands are granted to *B. to have and to hold to her* and to the heirs of *A.* her late huſband on her body begotten (1); in this caſe and by this deed *C.* hath an eſtate tail, and the woman hath only * an eſtate for life, and if *C.* die without iſſue, *D.* his ſiſter ſhall have the land *per formam doni.* But if one grant lands to *A.* late wife of *I. S.* to have and to hold to the ſaid *A.* and the heirs of *I. S.* on the body of the ſaid *A.* begotten; in this caſe the ſon and heir ſhall take no eſtate by the grant (2). And the ſame conſtruction ſhall be upon the ſame words in his will. * P. 105. Will.

Co. ſuper Lit. 26. If lands be granted to the huſband and wife, to have and to hold to them, and the heirs of the body of the ſurvivor of them; by this the ſurvivor ſhall have an eſtate tail after the death of the other.

Co. ſuper Lit. 20. If lands be granted to *I. S.* to have and to hold to him & *heredibus de carne ſua*, or *heredibus de ſe*, or *heredibus quos ſibi contigerit*, in all theſe caſes *I. S.* hath an eſtate tail and no more.

Co. ſuper Lit. 28. If lands be granted to husband and wife, to have and to hold to them, and the heirs of the body of the huſband, the remainder to the huſband and wife, and the heirs of their two bodies begotten, this remainder is void, and therefore by this the huſband hath an eſtate in tail, and the wife a joint eſtate for life with her huſband, and no more.

Co. 1. 140. If lands be granted to *I. S.* and his heirs of the body of *Iane a Noke* begotten; by this *I. S.* hath an eſtate tail, and no more.

Co. ſuper Lit. 20. If lands be granted to *I. S. & heredibus de corpore procreatis*; by this the heirs that ſhall be begotten afterwards ſhall take. And if lands be granted to *I. S. & heredibus de corpore procreandis*; by this the heirs of his body before begotten ſhall take *per formam doni* as well as thoſe that ſhall be begotten afterwards.

Co. ſuper Lit. 146. If one grant to *I. S.* that if he and the heirs of his body be not yearly paid 40*l.* that he or they ſhall diſtrain in the lands of the grantor; by this the grantee hath an eſtate in tail in the rent: and if he grant to *I. S.* that if he and his heirs be not paid, *&c.* that he or they ſhall, *&c.* he hath a fee ſimple in the rent (3).

Lit. ſect. 283, 285. Co. 8. 85. 96, 2, 24. Finche's law 60. Co. ſuper Lit. 9. Dier 307. Co. 7. 23. If one give or grant land to another, to have and to hold to him for life; or to him and his aſſigns, and ſay not how long, nor for what time; and the grantor make livery of ſeiſin according to the deed; by this the grantee hath an eſtate for his own life (4). But if no livery of ſeiſin be made, no eſtate at

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(1) It is preſumed the words printed *in Italicks* in this caſe, ſhould be omitted, to make it conſiſtent with *Mandevile's* caſe put by *Ld. Coke*, in 1 *Inſt.* 26. b. and to diſtinguiſh it from the next caſe in the text above.

(2) Becauſe he was named after the *Habendum*, *Co. Lit.* 26. b. See *note* 4. thereto, in the 13th edition, where one named after the *Habendum* ſhall take.

(3) See further what words make an eſtate tail, *Com. Dig.* Eſtates (B. 3.) *Vin. Abr.* Eſtate, (R.) *Bac. Abr.* Eſtate in tail (B.)

(4) If the grantor hath authority to make ſuch a grant; an eſtate for a man's own life being more beneficial, and of a higher nature, than for any other life, *Co. Lit.* 42. but if tenant in tail makes ſuch a grant generally, with livery, the grantee ſhall have the land but during the life of the tenant in tail, for that is the greateſt eſtate he can lawfully make; but if the king grants lands, or rent, and limits no eſtate, the grantee does not take any eſtate of freehold. *Roll. Abr.* Eſtate (O).

all, but an eſtate at will, doth paſs by this deed. And if he that doth grant the land, be but a leſſee for years of the land, and he make no livery of ſeiſin upon the grant; by this his term of years, and that eſtate which he hath, is granted. But if he make livery of ſeiſin upon the grant, then an eſtate for the life of the grantee will paſs, and it is a forfeiture of the eſtate of leſſee for years, of which he in reverſion may take preſent advantage. And if one grant to another, common in his land when he doth put in his own beaſts, or eſtovers in his manor when he cometh there, and ſay no more, by this it ſeems the grantee hath an eſtate for life.

17 Aſſ. Pl. 17.

Forfeiture.

* P. 106. * If one grant land to *I. S.* to have and to hold to him, or his heirs, in the disjunctive; this is but an eſtate for life, and no more. So if one grant lands to *I. S.* to have and to hold to him, and his heir, in the ſingular number; by this *I. S.* hath only an eſtate for life, and no fee ſimple.

Co. 5. 112. ſuper Lit. 8.

If one bargain and ſell land to another for money, and limit no time, and expreſs no eſtate; by this the bargainee ſhall have only an eſtate for life. But otherwiſe it was before the ſtatute of uſes, for then it had been a fee ſimple.

Co. 1. 87. 130. Plow. 539.

If lands be granted to *I. S.* for life, and after to the next heir male of *I. S.* and the heirs males of the body of ſuch next heir male; by this *I. S.* hath but an eſtate for life. But if it be to the next heirs males of *I. S.* it is an intail.

Co. 1. 66.

If one grant land to *I. S.* to have and to hold to him in fee ſimple, or in fee tail, without ſaying [to him and his heirs, or to him and his heirs males, or the like] this is but an eſtate for life, and no more. So if one grant land to *I. S.* to have and to hold to him and his ſeed, or to him and his iſſues generally, without more words; by this is made only an eſtate for life. But in the conſtruction of a will the law is otherwiſe, in moſt of theſe caſes (1).

20 H. 6. 33.

Co. ſuper Lit. 8. 20.

Will.

If lands be granted to two & *heredibus* without this word [*Suis*] by this they have an eſtate for their lives and no longer.

20 H. 8. 35.

If one grant lands to *I. S.* to have and to hold to him and his heirs for his own life, or for [the life of *I. D.*; by this *I. S.* hath an eſtate for life and no more.

Co. 5 112. 1. 140.

If one grant lands to *A.* and *B.* *Habendum ſibi & ſuis* omitting all other words; or to have and to hold to them and their aſſigns; by this they have an eſtate for life only. So if lands be granted to any naturall perſon, to have and to hold to him and his ſucceſſors; by this he hath only an eſtate for his life.

Co. 4. 29. ſuper Lit. 1. 8.

If one grant his lands to *I. S.* to pay his debts, to have and to hold to him generally, without limiting any eſtate; in this caſe *I. S.* hath an eſtate for life only.

Co. 8 96.

If lands be granted to *A.* and *B.* to have and to hold to them for their lives, to the uſe of *C.* for his life; by this *C.* hath an eſtate for his life if *A.* and *B.* live ſo long.

Dier 186.

If a tenant in tail grant *totum ſtatum ſuum*; by this the grantee hath an eſtate for the life of the grantor, and no longer. And if a leſſee for life grant all his eſtate; hereby his eſtate for life doth paſs; for this is as much as he can lawfully grant.

Lit. ſect. 613. Co. 1. 53. ſuper Lit. 345. Plow. 562. 162. Co. ſuper Lit. 24.

(1) See poſt in the chapter on teſtaments.—Difference of conſtruction does not only ariſe on different inſtruments: for in the very ſame caſe, and in the very ſame court, the ſame limitation has received two different conſtructions, when applied to a legal, and to a truſt eſtate. See *Fearne* on cont. rem. 3d. edition 96.

If a man have a ſon and a daughter, and die, and lands be granted to the daughter and the heirs females of the body of the father; it ſeems by this ſhe hath only an eſtate for life.

Co. ſuper Lit. 42. 234, 235.

If one grant land to another, to have and to hold to her while ſhe ſhall live ſole, or during her widowhood, or ſo long as ſhe ſhall * behave herſelf well, or ſo long as ſhe ſhall dwell in ſuch a houſe, or ſo long as ſhe pay 10*l.* yearly, or ſo long as the coverture between her and her huſband ſhall continue; or if one grant lands to a man, to have and to hold unto him until he ſhall be promoted to a benefice, or the like: in all theſe caſes, if livery of ſeiſin be made according to the deed, or if the grant be of ſuch a thing whereof no livery is requiſite, the grantee hath an eſtate for his life, and no more, and that determinable alſo.

* P. 107.

Co. ſuper Lit. 183. 42, Plow. 161. F.N.B. 168.

If one grant lands to *I. S.* to have and to hold to him for life, and doth not ſay for whoſe life; this regularly ſhall be taken for the life of *I. S.* the leſſee, and not for the life of the leſſor. But if the leſſor himſelf have but an eſtate for life in the lands granted, then the leaſe ſhall be conſtrued to be, and to endure during that life only, by which the leſſor did hold, to prevent a forfeiture. And if he that doth make the leaſe, be tenant in tail of the land, this ſhall be taken to be a leaſe for the life of the leſſor. And if a tenant for life of land, make a leaſe for years of it, and then grant his reverſion by the name of a reverſion, to another, to have and to hold to him and his heirs; by this he hath only an eſtate for the life of the grantor, and no more. So if tenant in tail of land, grant it to one for years, and after grant his reverſion to another, to have and to hold to him, and his heirs; this ſhall be conſtrued to be an eſtate [for the life of the tenant in tail, and no longer, and the atturnment of the tenants in theſe caſes will not alter the caſes. And ſo it is in caſe of a releaſe alſo; as if tenant in tail doth releaſe to *B.* (being leſſee for years of the land) all his right to the land, this ſhall be taken to enure but for the life of the tenant in tail and no longer: as if a man retain a ſervant, and ſay not how long; this ſhall be taken for a year (1), *Conſtructio legis non facit injuriam.*

Co. ſuper Lit. 147. Co. 8. 85.

If one grant to *I. S.* that if he be not paid yearly for his life 40*s.* he ſhall diſtrain in the land of the grantor for it; by this *I. S.* hath an eſtate for life in the rent. And if a man by his deed grant a rent of 10*l.* iſſuing out of all his land, quarterly, at the uſual feaſts, this is an eſtate for life of the grantee.

Co. 5. 9. 11. 3.

If one grant lands to *I. S.* and *I. D.* to have and to hold to them during their lives, omitting theſe words [and the longeſt liver of them] by this notwithſtanding they ſhall hold it during the life of the longeſt liver of them. And if lands be granted to *A.* to have and to hold to him during the lives of *B.* *C.* and *D.* without any more words; by this *A.* hath an eſtate during all their lives, and during the life of the longeſt liver of them. † And if lands be granted to *A.* to have and to hold to him during his life, and during the lives of *B.* and *C.* by this he hath a leaſe for his own life, and the lives of *B.*

† 38 Eliz. B. R. in the caſe of Ros & Adwick.

(1) For that retainer is according to law. See 13th. edition, *Co. Lit.* 42. b.

and

and *C.* and the longeſt liver of them. But if a leaſe be made to *I. S.* of land, to have and to hold to him during the time
* P. 108. * that *A.* and *B.* ſhall be juſtices of peace, or during the time that *A.* and *B.* ſhall be of the *Inner Temple*, or the like; in theſe caſes the failer of one doth determine the eſtate. [a] And if a leaſe be made to *B.* only, to have and to hold to him and *C.* for their lives; by this *B.* hath an eſtate for his own life only, and no more, and *C.* hath nothing at all (1). And here by the way let it be obſerved, in theſe and ſuch like caſes, where lands are granted to one man, to have and to hold to him [or to him and his aſſigns, or to him, his executors, adminiſtrators and aſſigns,] during the life, or during the lives of others; and in moſt caſes where a man is tenant *pur auter vie*, *i. e.* for the life, or lives, of another, or others, if the tenant *pur auter vie* in poſſeſſion die, his eſtate ſhall not go to his heirs, executors or adminiſtrators, unleſs they can firſt get into poſſeſſion after his death, but he that can firſt get into the poſſeſſion of the land after the death of the tenant *pur auter vie*, ſhall have it for his life, and after his death, then he that can firſt get into the poſſeſſion again, *&c.* And therefore if the land were let by the tenant *pur auter vie* at the time of his death to any undertenant for years, or for one year, or at will, and this undertenant be in poſſeſſion at the time of the death of the tenant *pur auter vie*, this undertenant ſhall have it for his life, if the life or lives by which it is held ſo long live, for the rule in this caſe is *occupanti conceditur*. *Et capiat qui capere poteſt.* And this eſtate is called an occupancy, and he that hath it an occupant (2). To prevent which miſchief, the leſſee muſt take care when he takes his leaſe, to have it made to him and his heirs during the life or lives of him or them by whom it is held, for in this caſe after his death his heir and none other ſhall have it; or if this be neglected, then he muſt take care to grant over his eſtate by act executed (for by his laſt will he may not deviſe it) to ſome friend and his heirs in truſt for him; or he may grant it over to another, and take a regrant of it to himſelf and his heirs; or he may make a leaſe for years of the lands to ſome friends in truſt, and by this means he may have the fruit of it during the term (3).

[a] Adjudged B.R. 8 Eliz. Hobart & Wiſemore's caſe.

Occupant.

Co. ſuper Lit. 41. 239. 388. Plow. 556. 28 Dier 328. 321, 264. Co. 10. 98.

For years. When ſuch a leaſe ſhall begin, and how long it ſhall continue.

When no time is ſet down for the beginning of an eſtate, then it ſhall begin preſently; otherwiſe it ſhall begin at the time expreſſed, if it may ſtand with law. If a leaſe for years be made, bearing date the 26th day of *May*, to have and to hold for twenty-one years from the date, or from the day of the

Co. ſuper Lit. 46. Co. 51. 2. 5. Dier 286. 307.

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(1) See further as to what words make an eſtate for life, in *Vin. Abr.* Eſtate (N. a.) *Bac. Abr.* Eſtate for Life (A).

(2) If he who claims to be occupant does not take actual poſſeſſion, he ſhall not be occupant, 1 *Sid.* 347. *Vaugh.* 188.

(3) By the ſtatute 29 *Car.* 2. *c.* 3. Tenant *pur autre vie*, may deviſe his eſtate by will atteſted by three witneſſes, and if he does not deviſe the eſtate, it is chargeable in the hands of the heir if it ſhall come to him by reaſon of a ſpecial occupancy, as aſſets by deſcent; in caſe there be no ſpecial occupant thereof, it ſhall go to the grantees executors or adminiſtrators, and ſhall be aſſets in their hands. See 2 *Salk.* 464. 2 *Vern.* 719. And by the ſtat. 14 *Geo.* 2. *c.* 20. the ſurplus of the eſtates *pur auter vie* in caſe of inteſtacy, is made diſtributable as perſonal eſtate. Theſe two ſtatutes have aboliſhed the title of *general* or *common* occupancy; but *ſpecial* occupancy by the heir at law, where the original grant is to a man and *his heirs* during the life of *ceſtuique vie*, ſtill continues. See further as to the general doctrine of occupancy, and of what things it may be, 2 *Bl. Com.* 8, 258, and 400. The notes to the 13th Edition, *Co. Lit.* 41. b. *Com. Dig.* Eſtates (F.) 2 *Ld. Raym.* 1000. 6 *Mod.* 66. *Bac. Abr.* Eſtate for life (B.) *Vin. Abr.* Occupant.—and Eſtate (R. a. 3.) *Eq. Ca. Abr.* Eſtate (B.) 1 *Atk.* 524. 3 *Atk.* 708.

date;

date; in theſe caſes the leaſe ſhall begin on the 27th day of *May* (1). But if the words be, to have and to hold from henceforth, or from the making hereof, in theſe caſes the leaſe ſhall begin on the day in which it is delivered. And if it be to begin *a die confectionis*, then it ſhall begin the next day after the delivery. And if it be, to have and to hold for twenty-one years, without mentioning when it ſhall begin, it ſhall begin from the * delivery, if there be no former leaſe in being; and if there be, then it ſhall begin from the time of the ending of that leaſe. If the deed have a date which is void, or impoſſible, as the 30th of *February*, or 40th of *March*, and the term be limited to begin from the date, then it ſhall begin from the delivery. So if a man by his deed recite a leaſe which is not, or which is void, or miſrecite a leaſe that is in *eſſe* in point material, and then ſay, to have and to hold from the end of the former leaſe; this leaſe ſhall begin in courſe of time at the time of the delivery of the deed.

* P. 109.

Co. 1. 154. Plow. 198. If one make a leaſe of land to *A.* for twenty years, and then grant it to *B.* to have and to hold to him from the end of the firſt term, *&c.* in this caſe this ſecond leaſe ſhall begin, as ſoon as the firſt leaſe, by what means ſoever, ſhall end. But if the words of the ſecond leaſe be, to have and to hold to him from the end of the twenty years, in this caſe the ſecond leaſe ſhall not begin untill the twenty years be expired. And if one make a leaſe of white acre to *A.* for ten years, and of black acre to *B.* for twenty years, and then, reciting both the leaſes, doth make a leaſe to *C.* to begin after the former leaſes; this ſhall be taken reſpectively, and ſhall begin, for white acre after the end of the ten years, and for black acre after the end of twenty years. Co. 6. 36. And if one makes a leaſe to Two for ſixty years, provided that if the leſſees ſhall die within the term, that then preſently after the deceaſe of the laſt of them longeſt living, the leſſor ſhall reenter, and one of them die; and after the leſſor doth make a leaſe to another, *Habendum &c. cum poſt ſive per mortem ſurſum redd' vel forisfacturam* of the laſt ſurviving leſſee *acciderit vacare* for forty years; in this caſe, this ſecond leaſe ſhall begin after the death of the leſſee ſurviving, reentry of the leſſor, or the effluxion of time of the firſt leaſe, which of them ſhall firſt happen, and the leſſee cannot at his election make it to begin at any other time.

Dier 261. If a man make a leaſe for thirty years, and four years after make another leaſe to another man, in theſe words. *Noveritis &c. me* A. *de* B. *predictis* 30. *Annis finitis dediſſe & conceſſiſſe* B. *de* C. *&c. Habendum à die confectionis preſentium et termino predicto finito, uſque ad finem* 31. *Annorum:* by this the ſecond term ſhall begin at the end of the thirty years. Craddock's caſe, Paſc. 7. Jac. Co. B. And if one make a leaſe to *A.* for twenty years, and after make a leaſe to *B.* to have and to hold to him, from the end of the firſt term, for

(1) In the caſe of *Pugh* and Duke of *Leeds*, ſolemnly determined in *B. R.* Michaelmas term 1777. Leaſe for twenty one years, made to commence *from the day of the date*, held to be a good leaſe in poſſeſſion, and the ſame as if it had been to hold *from the date*; the following caſes were mentioned in that deciſion; *Dyer* 218. *Moor* 4. 5 *Co. Clayton's caſe.* 5 *Co. Barwick's caſe. Flewellin's caſe.* 4 *Bulſt.* 177. 1 *Roll. Rep.* 387. 3 *Bulſt.* 204. *Co. Lit.* 46. *b.* 166. *b. Aleyne* 77. 6 *Wil. & M.* queſtions on a prebendal leaſe. 11 *Wm.* 3. *Sir Robert Hoare's caſe.* 2 *Ld. Raym.* 1141.—*Thompſon & Vandike*, in B. R. Michaelmas 1736. *cor. Ld. Hardwicke.* and the caſe of the *Attorney General* v. *Counteſs of Portland* in the Exchequer *cor. Sir Thomas Parker.* See further on this point, *Vin. Abr.* Eſtate (Z a.) Time (A.) *Com. Dig.* Eſtates (G. 8.) 1 *Wilſ. Rep. pt.* 2. *p.* 165. *Bac. Abr.* Leaſes (E.) rule 2. and *notes* to *Co. Lit.* 46. b.

twenty years, to be accompted from the date of the laſt deed; in this caſe the ſecond leaſe ſhall begin at the end of the firſt leaſe, and theſe words [to be accompted, &c.] ſhall be rejected.

If one make a leaſe of land to *A.* for ten years, and after by indenture grant it to *B.* to have and to hold to him, from Michaelmas next for ten years, and after the firſt leſſee doth purchaſe the reverſion, by which his term is drowned; in this caſe, the ſecond leaſe ſhall begin preſently when Michaelmas is come. Dier 112.

* P. 110. * If two jointenants be, and one of them grant the land to *I. S.* to have and to hold to him for twenty years, if the leſſor and his companion ſo long live; by this the leaſe ſhall continue no longer than they both live together, and when either of them is dead the leaſe is determined. [a] And if one grant his land to *I. S.* to have and to hold to him, his executors, *&c.* for the term of one hundred years, if *A. B.* and *C.* live ſo long, and leave out theſe words [or either of them] in this caſe, if either of them die, the leaſe is determined. But if the words be, to have and to hold for one hundred years if *A. B.* or *C.* [omitting or either of them] ſhall live ſo long, *contra.* [b] If a leaſe be made of land to the huſband and wife, to have and to hold to them for twenty-one years, if the husband and wife, or any child between them, ſhall ſo long live; this is a good leaſe, and ſhall continue for all their lives, and for the life of the longeſt liver of them, albeit the firſt words be in the copulative. Mich. 13. Jac. B. R. a Co. 5. 9. b Paſch. 30. Eliz. C. B.

If one poſſeſſed of land for a term of years, grant the ſame to another, to have and to hold to him, his executors and adminiſtrators, or to him and his aſſigns, or to him, without any more words; or if a man that is poſſeſſed of a term grant his leaſe to another, and doth not ſay for what time; it ſeems in theſe caſes, the whole term is granted, albeit no livery of ſeiſin be made. And in the firſt caſe if livery of ſeiſin be made, then it ſeems there doth paſs an eſtate for the life of the grantee, and therefore that this is a forfeiture of the eſtate of the leſſee for years, whereof he in the reverſion may take advantage preſently. And if a leſſee for years of land grant a rent out of the land generally, without any limitations, this ſhall be conſtrued to enure for a grant of the rent ſo long as the eſtate of the grantor doth continue. But if he grant a rent by expreſs words, for the life of the grantee: by this the grantee ſhall have it for all the term if he live ſo long. Dier 307. 69. Plow. 520. 524, 525. 423, 424. Co. 7. 23.

If one grant lands to *I. S.* to have and to hold to him for life, reſerving the firſt ſeven years a roſe, and if he will hold the land over, that he ſhall pay a rent in money, and no livery of ſeiſin is made; by this it ſeems in certain is made a leaſe for ſeven years, untill the condition be performed; and then alſo it ſeems it is a leaſe for no longer time. And ſo perhaps it will be, if livery of ſeiſin be made. Co. ſuper Lit. 218.

If one grant a rent of 5*l. per annum* unto *I. S.* to have and to hold to him, *&c.* until he ſhall receive 20*l.* in this caſe he ſhall have a leaſe for four years of this rent. But if lands be granted to *I. S.* to have and to hold, *&c.* until he ſhall receive 20*l.* out of the profits of it; in this caſe if livery of ſeiſin be made, the grantee hath an eſtate determinable upon the levying of the money; and if no livery be made, he hath no eſtate at all but at will. Co. ſuper Lit. 42. Plow. 273.

Co. ſuper Lit. 218.

If one make a leaſe for life, and ſay that if the leſſee within one * year pay not 20*s.* that he ſhall have but a term for two years; by this if he doth not pay the money he hath only a leaſe for two years, albeit livery of ſeiſin be made upon it.

* P. 111.

Co. 9. 63, 60.

If one make a leaſe to *I. S.* to have and to hold to him, his executors *&c.* for ten years if *I. D.* ſhall live ſo long, and *I. D.* is dead at the time when the leaſe is made; in this caſe *I. S.* hath an abſolute leaſe for ten years.

Plow 273. Co. ſuper Lit. 45. Dier 24.

If one grant lands to *I. S.* to have and to hold to him, his executors, *&c.* for three years, and ſo from three years to three years during the life of *I. S.* or from three years to three years during the life of the leſſee; by this it ſeems *I. S.* hath a leaſe for ſix years and no more. And if one grant lands to *I. S.* to hold for three years, and after the end of thoſe three years for three other years, and after the end of thoſe three years for three other years, during the life of the leſſor; by this it ſeems *I. S.* hath a leaſe for nine years and no more. And yet if in theſe and ſuch like caſes, where a leaſe is made from ſo many years to ſo many, for the life of any perſon, livery of ſeiſin be made upon this deed, *ſecundum formam chartæ*; this perhaps may be an eſtate for life.

14 H. 8. 10. Co. 6. 35. 10. 106.

If lands be granted, to have and to hold from Lady-day, *pro termino unius Anni & ſic de uno Anno in unum Annum quamdiu ambabus partibus placuerit*; by this the grantee hath a leaſe for three years only in certain, and afterwards a leaſe at will. And if lands be granted to have and to hold from the Nativity of Chriſt next, *pro termino unius Anni, & ſi in fine dict' unius Anni ambæ partes placerent quod eadem preſens dimiſſio foret renovata tunc habend' premiſſa* to the leſſee, *&c. ab & poſt dictum feſtum Nativitatis Domini uſque terminum trium Annorum extunc prox' ſequen'*; by this the grantee hath a leaſe in certain but for one year only, and if the parties agree again, a leaſe for three years.

Co. 6. 35. 21 H. 7. 38.

If one make a leaſe to *I. S.* to have and to hold to him for years, and ſay not how many years: by this the leſſee hath a leaſe for two years and no more.

Co. 3. 19.

If one grant his land to *I. S.* to have and to hold to him until *I. D.* ſhall come to twenty-one years of age; in this caſe if *I. D.* dye before that time the leaſe is ended.

Co. 1. 44. 7 H. 4. 42.

If a man poſſeſſed of a term of years of land doth grant the land to another and his heirs, this by conſtruction will amount to a good grant of his intereſt (1).

Dier 263.

If lands be granted to huſband and wife, and to *I. S.* to have and to hold to them, and to the heirs of the huſband and *I. S.*; by this the wife hath only an eſtate for life, in a moiety with her huſband, and the husband and *I. S.* have the fee ſimple in joynt-tenancy, to them and their heirs.

Co. 8. 87. 10, 50. ſuper Lit. 25. Dier 145.

Limitation of eſtates to divers perſons.

If lands be granted to two brothers, or two ſiſters, or to a * brother and ſiſter, or to a father and ſon, or any others, to have and to hold to them, and the heirs of their bodies begotten: by this they have joynt eſtates for their lives, ſo that the ſurvivor of them will have the whole for his life, and ſeveral inheritances, *i. e.* eſtates in general tail by moieties in com-

* P. 112.

(1) See ante 89. note 1.

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mon one with another (1). And if land be granted to two men and their wives, and the heirs of their bodies begotten; in this caſe they have joynt eſtates for life, and afterwards the one huſband and wife ſhall have the one moiety, and the other huſband and wife the other moiety, in common (2). And if lands be granted to a man and two women, to have and to hold to them, and the heirs of their bodies; by this they have each of them an eſtate tail in common with the other (3).

If lands be granted to huſband and wife, to have and to hold to them, and their heirs of their bodies iſſuing, or in any ſuch like manner; by this the wife hath an eſtate tail, as far forth as the huſband. But if it be granted to them, to have and to hold to them, and the heirs of the body of the huſband, or to the huſband and wife, and the heirs of the huſband which he ſhall have by his wife, or in any ſuch like manner; by this the wife hath only an eſtate for life, and the whole eſtate tail is in the huſband. So *vice verſa* if lands be granted to huſband and wife, and the heirs of the wife upon her body begotten by the huſband; by this he hath an eſtate for his life only, and his wife the whole eſtate tail. And if lands be granted to the husband, to have and to hold to him and the heirs of his body, on the body of his wife begotten; or to have and to hold to him, and the heirs of his body begotten on the wife he ſhall firſt marry; or to have and to hold to him, and his wife he ſhall firſt marry; and the heirs of their bodies begotten; in theſe caſes the huſbands have the whole eſtate, and the wives nothing at all. But otherwiſe it is it ſeems when the eſtate is limited by way of uſe to a man and his wife, that he ſhall afterwards marry, for by this it ſeems the wife ſhall take alſo.

Lit. Sect. 27, 28, 29. Co. ſuper Lit. 26. Dier 340. Co. 1. 100.

Uſe.

If lands be granted to *A.* a married man, and to *S.* a married wife, and to the heirs of their bodies engendred; by this they have each of them an eſtate tail preſently executed, and whiles the wife of the huſband, and the huſband of the wife live, they ſhall hold it for their lives, and if they happen to dye, and theſe to intermarry and have iſſues, their iſſues ſhall have it according to the intail.

15 H. 7. 10.

If lands be granted to *A.* and *B.* to have and to hold to *A.* for life, the remainder to *B.* in fee: by this *A.* ſhall have the whole for his life, and *B.* the fee ſimple afterwards (4).

Dier 126. 56.

When the *Habendum* ſhall be ſaid to be repugnant and void; and when not, but ſhall control, divide, or expound the premiſes.

* P. 113.

As touching this matter, theſe differences are to be taken; between things that are granted, and between the eſtates: when the things that are granted are ſuch as lye in grant, and take effect by the delivery of the deed only, without any ceremony, or take * effect by the ſame ceremony; and when not, but another ceremony is required to the perfection of the grant and eſtate: and when there is an expreſs eſtate made by the deed in the premiſes thereof; and when but an implied eſtate only: as for examples, if one grant land, rent, common, or any ſuch like thing, to one and his heirs, by the premiſes of the deed,

Co. 2. 23. 8. 56. Perk. Sect. 181. 14 H. 8. 14. Co. ſuper Lit. 183.

(1) And if a gift be made to two men and the heirs of their two bodies, the remainder to them two and their heirs; they are joint tenants for life, tenants in common of the eſtate tail, and joint-tenants of the fee. *Co. Lit.* 183. b.

(2) Of the inheritance; and no croſs remainder or other poſſibility ſhall be allowed by law, where it is once ſettled and takes effect. *Co. Lit.* 25. *b.*

(3) So if lands are given to two men and one woman, and the heirs of their three bodies begotten, they have ſeveral inheritances. *Co. Lit.* 184. a.

(4) See further in *Bac. Abr.* Joint-tenants (D). *Com. Dig.* Eſtates (K. 1.) *Vin. Abr.* Joint-tenants (P.)

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to have and to hold to him for life, or to have and to hold to him and to his aſſigns, without more words; in this caſe the *Habendum* is repugnant and void, and by this the grantee ſhall have an eſtate in fee ſimple, if livery of ſeiſin and atturnment as the caſe doth require be duly made, for otherwiſe no eſtate at all, but at will, will paſs. So if a man grant a rent, or any ſuch like thing that lieth in grant, to one and his heirs, to have and to hold to him for years; this is a void *Habendum*, and the grantee ſhall have the fee ſimple. But if a man grant land to another and his heirs, to have and to hold to him for a certain number of years; in this caſe, whether he make livery of ſeiſin or not, it is a good *Habendum*; and by this the grantee ſhall have an eſtate for ſo many years, and no more. So if one grant land, rent, common, or any ſuch like thing, to one in the premiſes of the deed, without limitation of eſtate, (which in judgment of law is an implied eſtate for life) to have and to hold to him for a certain number of years, or at will; this *Habendum* is good, and ſhall ſtand with the premiſes, and qualify it; and by this the grantee ſhall have but a leaſe for years, or at will, as the *Habendum* is. And if one grant land by the premiſes of a deed to one and his heirs of his body, to have and to hold to him and his heirs; this *Habendum* ſhall ſtand, and this ſhall be taken an eſtate tail, and a fee ſimple expectant. So *vice verſa*, if land be granted to one and his heirs, to have and to hold to him, and his heirs of his body; this ſhall be conſtrued an eſtate tail, and a fee ſimple expectant, and ſo both ſhall ſtand together (1).

Co. 8. 154. 21 H. 6. 7. Co. ſuper Lit. 20. Dier 126. & per curiam in Thurman's caſe, Paſc. 16 Jac. B. R. 21 H. 6. 7. Co. ſuper Lit. 21.

If lands be given to *B.* and his heirs, to have and to hold to *B.* and his heirs, and if he dye without heirs of his body, that it ſhall revert to the donor, it ſeems this is a fee tail only, and no fee ſimple expectant. *Voluntas donatoris in charta doni ſui manifeſtè expreſſa obſervanda eſt.*

Co. 10. 107, 108.

If a leaſe for years be made of land, and then the leſſor by the premiſes of the deed, granteth the land to another, to have and to hold the reverſion of the land to him, *&c.* for life; this *Habendum* ſhall ſtand. So if by the premiſes of the deed, the reverſion be granted, to have and to hold the land itſelf, this is good and both ſhall ſtand together; but nothing is granted in either caſe but the reverſion.

Dier 304. Co. 5. 19.

If the next advowſon of a church be granted to three, to have and to hold to them, and either of them, jointly, and ſeverally; this is joint and the *Habendum* is void.

† Co. 2. 55. ſuper Lit. 183. Dier 106.

† And yet if one grant land to two by * the premiſes of the deed, To have and to hold to one of them for life, the remainder to the other for life; this is not repugnant, but ſhall ſtand together, and make the eſtates ſeveral, and in remainder one after another. So if a leaſe be made to two, to have and to hold the one moiety to the one, and the other moiety to the other; by this they have ſeveral eſtates. *Expreſſum facit ſemper ceſſare tacitum.*

* P. 114.

Dier 272. Plow. 520.

If a man have a leaſe for years of land, and he reciting this, by the premiſes of the deed doth grant all his eſtate in the land, to have and to hold the land or the term after his death, or for part of the time only; in this caſe the *Habendum* is void,

(1) See before in page 98. note 4.

and the whole eſtate doth paſs immediately by the premiſes (1).

If a tenant for life ſurrender a moiety of his land, and the leſſor grant it all to a ſtranger, to have and to hold the one moiety for life, and the other moiety for forty years after the death of the tenant for life; this *Habendum* ſhall ſtand and enure according to the grant. Dier 256.

If a man ſeiſed of land in fee make a leaſe for life of it to one, and after grant the reverſion of it to another, to have and to hold the reverſion and the tenements aforeſaid *cum poſt mortem, forisfact', &c. vacare acciderit*; in this caſe, the *Habendum* and premiſes may ſtand together (2). It is uſual in the *Habendum* of a deed to ſet down to what uſe the party, to whom the deed is made, ſhall have the thing granted. But touching this, and the matters that do concern uſes, ſee *uſe infra* at large. And ſee alſo more for the *expoſition of deeds* in *Teſtaments numb.* 8. *Grant numb.* 4. *Leaſes cap.* 14. *numb.* 4. Curia paſ. 7 Jac. Co. B.

Note. And here note, that parol agreements and conveyances have the ſame conſtruction for the moſt part made upon them, as are made before upon deeds. And therefore if a man by word of mouth, without any writing, grant all his land in *Dale* to *I. S.* to have and to hold to him for life, but doth not ſay for whoſe life; this ſhall have the ſame conſtruction as ſuch a grant made in writing hath (3).

In the reſervation of rent: and how that ſhall be taken. This is always taken moſt in advantage of the feoffee, grantee, leſſee, *&c.* and againſt the feoffor, grantor, leſſor, *&c.* and yet ſo as the rent be paid during the time (4). And therefore if the reſervation be only to the feoffor, grantor, *&c.* and the deed do not ſay alſo [to his heirs, executors, *&c.*] this reſervation ſhall continue only for the life time of the grantor and ſhall determine with his death. And ſo alſo it is where the reſervation is to the feoffor, or his heirs, in the disjunctive; for in this caſe the rent ſhall continue only during the life of the grantor (5). And yet if one make a leaſe for years rendring rent yearly during the ſaid term, to the leſſor, or his heirs, or executors; this is a good reſervation during all the term, by reaſon of theſe words [during the term] (6). So if the feoffor or leſſor be * ſeiſed in fee, and make a feoffment in fee, or leaſe for life or years, rendring rent to the feoffor, or leſſor, or his executors or aſſigns; in this caſe the rent ſhall continue only for the life of the leſſor. But if the reſervation be to the feoffor, or leſſor, his heirs and aſſigns, in the copulative, or in the disjunctive to him, or his heirs, or to him and his ſucceſſors (if it be the leaſe of a corporation) during the term; then all the aſſignees of the reverſion ſhall enjoy it. And if the reſervation be thus, yielding and paying ſo much rent (without any

Co. 5. 111. 10. 106. 8. 71. Co. ſuper Lit. 47. 213. 214.

* P. 115.

Plow. 171. 21 H. 7. 25. 27 H. 8. 19. Dier 45.

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(1) See accordingly, 1 *Salk.* 346. *Skinn.* 528.

(2) See further, in what caſes the *Habendum* ſhall be repugnant to the premiſes, *Vin. Abr.* Grants (K. a.) and the caſe of *Throckmortom* v. *Tracy*, *Plow.* 145.

(3) See accordingly 1 *Wood* 254. 5.—but ſee *ſtat.* 29. *Car.* 2. *c.* 3. and 2 *Bl. Com.* 297.

(4) By what words a reſervation may be made. See *Com. Dig.* Remainder (B. 2.) *Vin. Abr.* Reſervation (L.)

(5) And is void as to the heir, 1 *Vent.* 163. for the reſervation being in the disjunctive, to the feoffor *or* his heirs, both cannot take it, and the word *heirs* cannot be a word of limitation, for if the heirs are to take at all, they muſt take originally, and if the rent veſts in the feoffor, it cannot afterwards go to the heirs, for that would be contrary to the reſervation.

(6) If the rent is made payable *yearly*, without ſaying during the term, the payment muſt be made during the term. *Moor* 459.

more

more words,) this ſhall be taken for all the time of the eſtate, and ſhall go to him in reverſion accordingly. And if the reſervation be, rendring ſo much rent during the ſaid term, and doth not ſay to whom; in this caſe it ſhall be conſtrued to be to him that hath the reverſion, and accordingly it ſhall be paid and ſhall continue during the term (1).

a So held in the caſe of Bland, M. 8 Gar. B. R.

[a] But if *A.* be ſeiſed of land in fee, and make a leaſe for years of it, rendering rent to *A.* [without ſaying to his heirs, *&c.*] during the ſaid term; this rent ſhall continue only during the life of *A.* and no longer. And yet if *A.* be poſſeſſed of a term only, and make an under leaſe or aſſignment with ſuch a reſervation, *Quere.*

27 H. 8. 19.

If the reſervation be thus, yielding and paying 20*s.* during the ſaid term, omitting the word [yearly] this ſhall be taken, to be not once only, but yearly during the term, and accordingly it muſt be paid.

b Paſ. 21 Jac. Hudſon & Brent B. R. Co. 10. 107.

[b] And if a leaſe be made for years, rendring in every middle of the year, *quolibet medio Anni* 20*l.* this ſhall be paid during the term.

If one by deed indented grant lands to *A.* to have and to hold to him for life, the remainder to *B.* and the heirs of his body, and for default of ſuch iſſue, to remain to *D.* in tail, or for life, yielding therefore yearly, *&c.* in this caſe the reſervation ſhall extend to all the eſtates.

Dier 130. Co. 5. 111. ſuper Lit. 217.

If a leaſe be made the 10th. day of *Auguſt*, rendring rent at our Lady day and Michaelmas; in this caſe albeit our Lady day be firſt named, yet the firſt payment ſhall be at Michaelmas next after the making of the deed.

Per. Williams & Yelverton Juſt.—Ch. Juſt. contra, 9 Jac. B. R. Co. 10. 106.

If the reſervation be at Michaelmas, or within twenty days after: in this caſe the 20th. day ſhall be taken excluſive. But if the rent be to be paid at Michaelmas or by the ſpace of twenty days after, in this caſe the 20th day ſhall be taken incluſive.

If a leaſe be made in *December*, from the Nativity of Chriſt next for one year with this addition, *Et ſi in fine dicti Anni ambæ partes agrearent quod eadem dimiſſio foret renovata tunc habend' & tenend' premiſſa dicto I. S.* (the leſſee) *ab & poſt dictum feſtum tunc proxim. ſequend. uſque finem trium Annorum. Reddendo inde Annuatim durante dicto termino dict. W. S. &c.* in this caſe, the reſervation ſhall relate to both the terms; and the rent ſhall be paid the firſt year, although they do not agree to renew the leaſe.

Co. ſuper Lit. 214.

[*] If two jointenants by deed poll, or by word, make a leaſe for life, reſerving a rent to one of them; this ſhall go to them both (2). So if one of them be tenant for life, and the other in fee, and they join in a leaſe for life; or gift in tail reſerving a rent; the rent ſhall enure to them both. But if tenant for life, and he in reverſion, join in a leaſe for life, or gift in tail by deed reſerving a rent, the rent ſhall enure to the tenant for life only, during his life, and after to him in reverſion.

* P. 116.

Plow. 171. 289. Co. 10. 106.

If two tenants in common make a leaſe of their land rendring 20*s.* rent; this ſhall be but one 20*s.* and not two 20*s.* So if the leaſe be rendring a hawke or a horſe: by this they ſhall have but one hawke, or one horſe, and not two hawkes or

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(1) See accordingly, *Co. Lit.* 47. a. and further, *Vin. Abr.* Reſervation (N).—by what *words* the rent reſerved may be continued to thoſe who become intitled after the death of the leſſor, ſee *Gilb.* on Rents 64.

(2) In reſpect to the joint reverſion; ſo a ſurrender to one of them ſhall enure to them both. *Co. Lit.* 214. a. but if the leaſe be by deed indented of them both, and the reſervation to one of them only, it ſhall enure to him only, to whom it is made, *Lit.* § 346. ſee further for the reaſon, and authorities on this point, *Gilb.* on Rents 63. *Bac. Abr.* Rent (G.) *Vin. Abr. tit.* Reſervation (E.)

two horſes, as it ſhall be in caſes where they do joyn in the grant of ſuch things out of their land (1).

If one make a gift in tail of two acres of land, the one at the common law, and the other in burrow Engliſh, rendring an oxe to him and his heirs, and the donee having two ſons die, and the eldeſt ſon doth inherit the one acre, and the youngeſt ſon doth inherit the other; in this caſe the donor and his heirs ſhall have but one ox, *&c.* Co. 10. 106.

If one make a leaſe of land for years if the leſſee live ſo long, and after the leſſor by his deed indented doth grant the land to another, to have and to hold the reverſion to the grantee for his life *cum poſt mortem &c. aut aliter acciderit vacare reddend' inde Annuatim* to the grantor and his heirs *cum reverſio predicta acciderit*, 9*s.* 4*d. per annum*; in this caſe this reſervation of rent ſhall not begin before the reverſion happen in poſſeſſon. Co. 10. 107, 108.

If rent be reſerved to be paid at two terms, and it is not ſaid by equall portions; yet it ſhall be ſo taken, and it muſt be ſo paid (2). 13 H. 4. Avowry 240. Co. 8. 95. 10. 47. Bro. Done 57. Fi z. Done 2.

In other reſpects,

If one be poſſeſſed of a term of years of land, and grant it by deed to *I. S.* for his life, and after his death to *I. D.* in this caſe the whoſe term is granted to *I. S.* and his executors, adminiſtrators, and aſſigns ſhall have it and not *I. D.* But if a term were ſo deviſed by will, *contra*. And if one give or grant to another his horſe, or his books for his life, and that after his death they ſhall remain to another, the remainder is void, and the firſt ſhall have it for ever, for the gift or grant of ſuch a thing for an hour is the gift of it for ever (3).

Deviſe.

Remainder.

See more in *uſe numb.* 7. (4).

And it is now time that we come to the other parts of a deed and firſt to a *condition*.

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(1) See accordingly. *Bro. Abr. tit.* Reſervation *pl.* 44.

(2) It is very truly obſerved, in the preface to Ld. Ch. Baron *Gilbert*'s Treatiſe on Rents, that there is no part of the law more extenſively uſeful, and intereſting, than that of rents, and yet perhaps no part in which thoſe niceties and diſtinctions, that are eſſential both to rights, and the means of recovering them, are leſs underſtood. Thoſe who ſeek to obtain a clear knowledge of the doctrine of rents, and the practice reſpecting them, will find very conſiderable aſſiſtance in that excellent book, and in another ſmall treatiſe of the ſame author on diſtreſſes and replevin. See alſo the ſtatutes of 32 *H.* 8. *c.* 37. 2 *W. & M. c.* 5. 4 *Ann. c.* 16. § 10. 8 *Ann c.* 14. 4 *Geo.* 2. *c.* 28. 11 *Geo.* 2. *c.* 19. 20 *G.* 2. *c.* 52. § 42. and further in *Co. Lit.* 47, and the notes thereto.

(3) But in a will, ſuch a deviſe of a perſonalty, with a remainder over, is good; whether it be by way of uſe, or not, ſee the caſe of *Hyde* v. *Parrat*, 1 *Pr. Wms.* 1.

(4) It may not be improper to ſubjoin ſome account of the ſeveral acts of parliament for *regiſtering deeds* and *wills*.

The firſt ſtatute in order of time is that of 2 & 3 *Ann. c.* 4. "For the publick regiſtering of all deeds, "conveyances, and wills, that ſhall be made of any honors, manors, lands, or hereditaments *within the Weſt "riding of the county of York* after the 29th of *September* 1704," It enacts, that a memorial of all deeds, and conveyances which ſhall be made after the 29th of *September* 1704, and of all wills and deviſes in writing, where the deviſor or teſtator ſhall die after the ſaid 29th of *September*, whereby any honors, manors, *&c.* in the ſaid Weſt-Riding *may be any way affected in law or equity, may, at the election of the parties concerned*, be regiſtered in manner directed by that act, and that every deed or conveyance, that ſhall, after any memorial is ſo regiſtered, be made of the honor, manor, *&c.* comprized in any ſuch memorial, ſhall be adjudged fraudulent and void againſt any ſubſequent purchaſer or mortgagee for valuable conſideration, unleſs ſuch memorial thereof ſhall be regiſtered as by the act is directed, before the regiſtering of the memorial of the deed or conveyance, under which ſuch ſubſequent purchaſer or mortgagee ſhall claim; and that every deviſe by will of the honors, *&c.* contained in any memorial ſo regiſtered, that ſhall be made and publiſhed after the regiſtering of ſuch memorial, ſhall be adjudged fraudulent and void againſt any ſubſequent purchaſer or mortgagee for valuable conſideration, unleſs a memorial of ſuch will be regiſtered in ſuch manner as by the act is directed. The act then eſtabliſhes an office for the regiſter;—directs the mode and time of his election by the freeholders, and of a ſucceſſor on his death, forfeiture, or ſurrender of the office;—the mode and form of the memorial, the ceremonials to be obſerved thereon, and the fees to be paid for it; and inflicts penalties on the regiſter in caſe of neglect. The act does not extend to any *copyhold eſtates, nor to any leaſes at a rack rent, nor to any leaſe not*

exceeding twenty-one years where the actual poſſeſſion and occupation goeth along with the leaſe. It directs that memorials of wills regiſtered within ſix months after the death of every reſpective teſtator, dying within the kingdom of *England*, dominion of *Wales*, or town of *Berwick* upon *Tweed*, or within three years after the death of every reſpective teſtator dying in parts beyond the ſeas, ſhall be as valid againſt ſubſequent purchaſers, as if the ſame had been regiſtered immediately after the teſtator's death.

The ſtatute of 5 *Ann. c.* 18. is for inrolment of bargains and ſales within the *Weſt Riding* of the county of *York*, in the regiſter-office there, and for making the ſaid regiſter more effectual.

The ſtatute of 6 *Ann. c.* 35. eſtabliſhes a regiſter for the *Eaſt Riding of the county of York*, and for the *town and county of Kingſton upon Hull*, for all deeds, and wills, of lands therein, which ſhall be made and executed after the 29th of *September* 1708, on the ſame plan, and under nearly the ſame regulations, as in the before mentioned act, and this act directs that all the clauſes and proviſions contained in it, which are not provided for or contained in the ſaid acts of 2 & 3 *Ann. c.* 4. and 5 *Ann. c.* 18, ſhall extend to lands in the *Weſt Riding*, as effectually as if they had been inſerted in the ſaid acts for eſtabliſhing the regiſter in the *Weſt Riding*.

The ſtatute 7 *Ann. c.* 20. eſtabliſhes in like manner a regiſter for the *county of Middleſex* after the 29th of *September* 1709, with an exception not only of *copyhold eſtate*, *leaſes at a rack rent*, and *leaſes not exceeding twenty-one years*, as in the ſeveral acts before mentioned, but with an additional exception of the *chambers* in *Serjeant's Inn*, the Inns of *Court*, or Inns of *Chancery*.

The ſtatute of 8 *Geo.* 2. *c.* 6. eſtabliſhes in like manner a regiſter for the *North Riding* of the county of *York* after the 29th day of *September* 1736.

Theſe acts, except 5 *Ann. c.* 18. appear at length in 1 *vol. Wood's Conv. p.* 452 to 480.

For ſome general obſervations on the act of 7 *Ann. c.* 20. clear directions as to the mode of regiſtering deeds and wills, and various precedents of memorials, ſee *Rigg's Inſtructions for the regiſtering of Deeds, &c.* and *Horſeman's Prec. in Conv.* 2 vol. 821.

Mr. Juſtice *Blackſtone* in 2 *vol.* of his *Commentary*, *p.* 343, treating of theſe acts, ſays, "but however "plauſible theſe proviſions may appear in theory, it hath been doubted by very competent judges, whether "more diſputes have not ariſen in thoſe counties (where regiſters are eſtabliſhed) by the inattention and "omiſſions of parties, than prevented by the uſe of regiſters."

By theſe ſtatutes there is not any time limited for regiſtering deeds; it is therefore obvious from an inſpection of the acts, how neceſſary it is, *that deeds ſhould be regiſtered immediately on their being executed*; to inforce this the more ſtrongly, it may not be uſeleſs to conſider, If a ſubſequent conveyance or mortgage ſhould be executed for a valuable conſideration, and from an almoſt momentary inattention or delay of the firſt vendee, or mortgagee, in not immediately regiſtering, the ſecond vendee or mortgagee ſhould regiſter firſt; whether, in ſuch caſe, the firſt vendee, or mortgagee, doth not therebybecome in a worſe ſituation, than he would have been by law, in caſe the regiſtring act had not been made.

For the operation and conſtruction of the regiſtering acts, ſee the caſes of *Cheval v. Nichols.* 1 *Str.* 664. *Honeycomb* v. *Waldron*, 2 *Str.* 1064. *Forbes* v. *Deniſton*, 2 *Brown's Parl. Ca.* 425. *Hine* v. *Dodd*, 2 *Atk.* 275. *Le Neve* v. *Le Neve*, 3 *Atk.* 646. and S. C. 1 *Veſ.* 64.

CHAP. VI.

Of a Condition.

1 Condition. *Quid.*

A Condition is a kind of law, or bridle, annexed to ones act, ſtaying or ſuſpending the ſame, and making it uncertain whether it ſhall take effect or no; or, as others define it, it is *modus*, a quality annexed by him that hath eſtate, intereſt, or right, to the land, *&c.* whereby an eſtate, *&c.* may either be created, defeated, or enlarged upon an incertain event. And this doth differ from a limitation, which is the bounds or compaſs of an eſtate, or the time how long an eſtate ſhall continue (1). And this ſometimes is contained in a teſtament or will, and ſometimes in a deed. And when it is in a deed it hath no proper place aſſigned it, but it may be in any part of the deed; howbeit for the moſt part it is placed next after the *Habendum*, or next after the reſervation of the rent. It is alſo ſometimes annexed to and depending upon eſtates; and ſometimes annexed to and depending upon recognizances, ſtatutes, obligations, contracts, and other things: conditions are alſo contained in acts of parliament and records. But of theſe we ſpeak not here in the enſuing matters, which are eſpecially to be applied to ſuch conditions as are uſually contained in deeds and annexed to the realty, *i. e.* to eſtates in fee-ſimple, fee-tail, for life, or years.

Termes of the law. Co. ſuper Lit. 201.

Limitation. *Quid.*

27 H. 8. 16. Co. 2 70.

2. *Quotuplex.*

And of theſe conditions there are divers kinds. For ſome are in deed or expreſs, *i. e.* when the condition is expreſſed by the party in legal terms, and by expreſs words in writing, or without writing, knit to the eſtate; as if I enfeoff a man of land, rendring rent at a day, on condition, that if it be not paid, it ſhall be lawfull for me to re-enter. And ſome are in law or implied, *i. e.* when the condition is *tacitè* created by the law, without any words uſed by the party. The firſt ſort of conditions alſo are ſome of them precedent, or executed, *i. e.* when the condition muſt be fulfilled ere the eſtate can take effect; as where an agreement is between me and *I. S.* that if he pay me 10*l.* at Michaelmas, he ſhall have ſuch a ground of mine for ten years; or where I make a leaſe of land to *I. S.* for ten years, provided that if he pay me 10*l.* at Michaelmas, he ſhall have the land to him and his heirs; and in theſe caſes by the performance of the condition the eſtate is acquired (2). And ſome of them are ſubſequent, and executory, *i. e.* when the eſtate is executed, but the continuance thereof dependeth upon the breach or * performance of the condition; as where a leaſe is made for years, on condition that the leſſee ſhall pay 10*l.* to the leſſor at Michaelmas, or elſe his leaſe ſhall be void; and in this caſe by the performance of the condition the eſtate is

Co. ſuper Lit. 202. Plow. Colthirſt's caſe. Co. 8. 43.

* P. 118.

(1) For the diſtinction between a condition, and a limitation, ſee *Bac. Abr.* Conditions (H.) and further in 1 *Atk.* 374, 383.

(2) Or if an eſtate be limited to *A.* upon his marriage with *B.* the marriage in a *precedent* condition, and till that happens no eſtate veſts in *A.* *Shower's Parl. Ca.* 83.—See further 1 *Pr. Wms.* 284. 2 *Atk.* 18. 1 *Veſ.* 4. S. C. 1 *Wilſ. pt.* 1. *p.* 159.

held and kept (1). Theſe conditions alſo are ſome of them in the affirmative, *i. e.* that do conſiſt of doing, as provided that the leſſee ſhall pay the rent, or pay 10*l.* to the leſſor, *&c.* And ſome in the negative, *i. e.* that conſiſt of not doing, as provided that the leſſee ſhall not alien, *&c.* And ſome of them are in the affirmative, which imply a negative, as provided that if the rent be unpaid that the leſſor ſhall reenter, which implieth a negative, *viz.* not paid. Conditions alſo are ſome of them collaterall, *i. e.* when the act to be done is a collaterall act, as that the party ſhall pay 10*l.* go to *Rome*, or the like. And ſome are inherent, *i. e.* ſuch as are annexed to the rent reſerved out of the land whereof the eſtate is made. And ſome of them alſo are reſtrictive and contain a reſtraint, as that the leſſee ſhall not alien, or do waſte, or the like. And ſome are compulſory, as that the leſſee ſhall pay to the leſſor 10*l.* ſuch a day, or his leaſe ſhall be void. And ſome of them be ſingle, *i. e.* to do one thing only. And ſome copulative, *i. e.* to do divers things. And ſome disjunctive, *i. e.* when one thing of divers is required to be done (2). And ſome conditions make the eſtate whereunto they are annexed voidable only, by entry or claim. And ſome of them make the eſtate void, *ipſo facto*, without entry or claim. And ſometimes they tend to deſtroy eſtates, ſometimes to make, or to enlarge eſtates, and ſometimes neither to make nor deſtroy, but only to clogg eſtates, as where a leaſe is made rendering rent on a day, on condition if it be not paid that the leſſor ſhall enter on the land and keep it till the rent be paid. And all theſe ways conditions may be lawfully made. *Ineſſe poteſt donationi modus, conditio ſive cauſa.*

Co. ſuper Lit. 201.

Lit. ſect. 327.

The conditions in law, or implied, are either by common law, or by ſtatute laws. The firſt ſort, are ſome of them founded on ſkill, as where an office is granted, there is a condition *tacite* implied, that if the grantee doth not execute it faithfully according to the truſt, the grantor may put him out. And ſome are without ſkill, as where an eſtate is made for life or years of land, there is this condition implied, that if the leſſee do waſte he ſhall forfeit the place waſted, or if the leſſee make a feoffment of the land, he ſhall forfeit his eſtate, and the leſſor ſhall enter. And where an eſtate is made in fee of land; this condition is implied, that the feoffee ſhall not alien it in mortmain (3). And theſe conditions do ſometimes give a recovery, and no entry, as in the caſe of waſte. And ſometimes they give an entry and no recovery, as in the caſe of alienation in mortmain. In the caſe of exchange alſo there is a condition in law, for which ſee *exchange*.

Co. 8. 44. 3. 65. Lit. 325. 378. F.N.B. 205.

Co. 4. 121.

* It is a general rule, that when a man hath a thing he may condition with it as he will. Conditions in deed therefore may

21 H. 7. 24. Perk. eſt. 707-708, &c.

* P. 119.

3. What things may be made and done upon condition: and to what things a condition may be annexed; or not; and how it may be made and annexed thereunto.

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(1) For the nature and doctrine of conditions *precedent*, and *ſubſequent*, ſee 2 *Pr. Wims.* 419, 626. 1 *Vern.* 83. 3 *Chan. Ca.* 130. 3 *Lev.* 132. 1 *Wood* 273. *Ca. Temp. Talb.* 166. *Swinb.* 267. *Eq. Ca. Abr.* Conditions (B.) *Bac. Abr.* Conditions (I.) *Vin. Abr.* Conditions (T.) *Com. Dig.* Conditions (B.) *Fearne* on conting. remain. 3 edit. 313. 2 *Burr.* 899. 4 *Burr.* 1930. 1 *Wilſ. pt.* 1. *p.* 105, 136.

(2) If the condition be in the copulative, and it is not poſſible to be ſo performed, it ſhall be taken in the disjunctive. See fully as to conditions copulative and disjunctive, *Vin. Abr.* Conditions (S. b.) and (Y. b. 2.)

(3) And to every eſtate of tenant by the curteſie, in dower, for life, *&c.* there is a condition in law ſecretly annexed to their eſtates, that if they alien in fee, *&c.* that he in the reverſion or remainder may enter. *Co. Lit.* 233. b. alſo poſt.—And if by any accident a corporation is diſſolved, the donor or his heirs *by a tacit condition annexed by law* ſhall have the land in reverſion, and not the lord by eſcheat. *Co. Lit.* 13. b.

be

be annexed to things inheritable, to frank tenements, or to chattells reall and perſonall: as for example, if a feoffment in fee, gift in tail, or leaſe for life, be made of lands or tenements, or a grant be of a rent, common, or the like thing, in fee-ſimple, fee-tail, or for life, theſe things may be done upon condition. So a leaſe for years of land, or a grant of a rent, *&c.* for years, may be made upon condition. And a leaſe may be made for five years on condition, that if the leſſee pay to the leſſor within the firſt two years ten marks then he ſhall have the fee, otherwiſe but for five years. Alſo a guardian in chivalry may grant the wardſhip of the body and land, or either of them, on condition. Tenants by ſtatute merchant, ſtaple, or elegit, may grant their eſtates upon condition. The lord may grant his ſeigniory to his tenant on condition. The tenant for life may grant his eſtate to his leſſor, or him in reverſion upon condition. The king may make letters patents of denization to an alien, or a charter of pardon to a man for his life, upon condition. Alſo releaſes and confirmations may be made upon condition. And a ſubmiſſion to an award may be upon a condition. But an inſtitution to a benefice, or an induction, may not be on a condition. An atturnment, or an expreſs manumiſſion of a villain cannot be upon a condition ſubſequent, as it may be upon a condition precedent. And a condition cannot be releaſed upon a condition, as ſome hold. But the contrary is held by others clearly, and that there is no difference between this and a releaſe of a right: *ideo quere.* (1). An award cannot be made on a condition, as was held in *Sherers* caſe 35 *Eliz.* A contract or ſale of a chattel perſonal, as an ox or the like, may be upon condition, as if *A.* ſell his horſe to *B.* that if *A.* do ſuch an act, then *B.* ſhall pay 5*l.* at the day agreed upon, otherwiſe but 4*l.* So if I agree with a phyſician, that if he cure ſuch a diſeaſe he ſhall have ſo much; and in this caſe he cannot have the money until he have done the cure. As where I promiſe a man 10*l.* when he hath built ſuch a houſe, in this caſe he cannot have the money until the houſe be built. Alſo retaining of ſervants, delivery of charters, and divers other things may be done upon condition. And if an executor aſſent to a legacy upon a condition; the aſſent is good, but the condition is void.

Perk. Sect. 281. Co. ſuper Lit. 274. Perk Sect. 724. Co. 8 98. Dier 242. Co. 2. 74. Co. ſuper Lit. 274. Perk. Sect. 712, 713. Co. 4. 28.

And conditions annexed to eſtates in all the caſes before, howſoever they are moſt frequently and ſafely made by deed in writing, yet it ſeems ſuch conditions may be made and annexed to any eſtate of a thing grantable without deed, without any writing at all; howſoever in ſome caſes it cannot be well pleaded, nor uſed without a deed; for it is a rule, that if a condition be pleaded * in any action to defeat a freehold, the deed wherein the condition is contained muſt be ſhewed. But of chattels real, as leaſes for years, and the like, or grants of chattles perſonal, a man may plead that ſuch leaſes and grants were made upon condition, without ſhewing the deed. And in the firſt caſe alſo of a condition to avoid a freehold, it may be given in evidence to a jury, and they may find the matter at large as it is, and ſo the party may have advantage of the condition without ſhewing any deed of it. Alſo the pleading

Lit. Sect. 365. Co. ſuper Lit. 161. 216. Doct. & Stu. 16. Perk. Sect. 715.

* P. 120.

Co. 5. 40.

(1) A condition cannot be releaſed, upon condition; for the condition annexed to the releaſe ſhall be void, and the releaſe ſhall be good. *Co. Lit.* 274. b. *Com. Dig.* Condition, (A. 8.)

of

of a feoffment in fee on condition, without deed and re-entry, is good if the party confeſſes the condition. A condition may be annexed to a limitation of uſes, and thereby the ſame may be made void (1). See *uſe*.

Co. 8. 90.

4. The nature of a condition in deed, and of a limitation.

The nature of an expreſs condition annexed to an eſtate in general is this; that it cannot be made by, nor reſerved to, a ſtranger; but it muſt be made by, and reſerved to, him that doth make the eſtate. And it cannot be granted over to another, except it be to and with the land or thing unto which it is annexed and incident. And ſo it is not grantable in all caſes; for the eſtates of both the parties are ſo ſuſpended by the condition, that neither of them alone can well make any eſtate, or charge, of or upon the land; for the party that doth depart with the eſtate, and hath nothing but a poſſibility to have the thing again upon the performance or breach of the condition, cannot grant or charge the thing at all. And if he that hath the eſtate, grant or charge it, it will be ſubject to the condition ſtill; for the condition doth always attend and wait upon the eſtate or thing whereunto it is annexed: ſo that although the ſame do paſs through the hands of an hundred men, yet is it ſubject to the condition ſtill; and albeit ſome of them be perſons priviledged in divers caſes, as the King, infants, and women covert, yet they alſo are bound by the condition (2). And a man that comes to the thing by wrong, as a diſſeiſor of land whereof there is an eſtate upon condition in being, ſhall hold the ſame ſubject to the condition alſo. And when the condition is broken or performed, *&c.* the whole eſtate ſhall be defeated: ſo that if there be a leaſe for life made by deed and not by will, the remainder over in fee, on condition that the leſſee for life ſhall pay ten pounds to the leſſor; if the leſſee pay not this ten pounds, the eſtate in remainder is avoided alſo. *Et ſic e converſo*, unleſs by ſpecial limitation it be otherwiſe provided; as if *A.* grant by indenture land to *B.* for life, the remainder to *C.* in fee, rendring rent to *A.* and his heirs, with condition that if the rent be behind, to re-enter and retain the land during the life of *B.* and no more, and *A.* doth enter in the life time of *B.* for non payment; this doth not deſtroy the remainder. And if tenant for life and he in remainder join in a feoffment on condition, that if, *&c.* then the tenant for life ſhall re-enter; this * is good without defeating the entire eſtate: for regularly a condition cannot avoid a part of an eſtate only, and leave another part entire; neither can the eſtate be void as to one perſon, and good as to another, (except it be in caſe of a condition annexed to an eſtate limited by way of uſe, as in *Frances* caſe *Co.* 8. 90.) And yet if *A.* make a gift in tail to *B.* the remainder to *B.* in fee upon condition not to alien, and *B.* doth alien; this doth defeat the eſtate tail only, and not the remainder. Alſo the whole eſtate of the whole, and not of ſome part only, ſhall be avoided; except by agreement the condition be ſpecially reſtrained to ſome part, and the re-entry given in that part only;

Co. Lit. 218. Dier 127.

* P. 121.

Dier 117. Co. 10. in Mary Portington's caſe. Super Lit. 230. Lit. Sect. 374. Perk. Sect. 564. fo. 108. Lit. fo. 224. Dier 127. Co. ſuper Lit. 224.

Co. ſuper Lit. 186. Perk. Sect. 818. Lit. Sect. 358. Dier 6.

Dier 298. Co. 8. 44. Perk. Sect. 818, 819.

(1) And ſhall be executed by ſtatute 27 *H.* 8. ſo that the donor and his heirs may take advantage of the condition. *Sav.* 77. See further in *Vin. Abr.* Condition (N.)

(2) And although regularly no laches ſhall be accounted in infants, or feme coverts, for non-entry, or non-claim to avoid deſcents; yet laches ſhall be accounted in them, for non-performance of a condition annexed to the ſtate of the land. *Co. Lit.* 246. *b.*

as where a feoffment is made of two acres, on condition that if ſuch a thing happen, the feoffor ſhall enter into one of them. And further when he that hath right doth re-enter by force of ſuch condition, he ſhall avoid all charges and incumbrances put upon the land after the condition made; for he that doth enter into land by force of ſuch a condition, muſt have it again in the ſame plight as it was when he parted with it. And finally, a condition for the moſt part will not determine the eſtate without entry or claim. So that howſoever a limitation hath much affinity and agreement with a condition, and therefore it is ſometimes called a condition in law[a], both of them do determine an eſtate in being before; and a limitation cannot make an eſtate to be void as to one perſon, and good as to another; as if a gift be made in tail to one and his heirs males, until he do ſuch a thing, and then his eſtate to ceaſe and go to another; yet herein they differ; 1. A ſtranger may take advantage of an eſtate determined by limitation, and ſo he cannot upon a condition. 2. A limitation doth always determine the eſtate without entry or claim, and ſo doth not a condition (1).

Perk. Sect. 840.

See infra.

a Lit. ſect. 380.
b Co. 9. 128. 8. 17. 6. 41. Plow. 413.

Co. 10. 40. Dier 300. Lit. Sect. 90.

5. When an eſtate ſhall be conditional; and what words will make a condition, and what not; and how a condition may be known from a covenant, or limitation.

Conditions annexed to eſtates are ſometimes ſo placed and confounded amongſt covenants, ſometimes ſo ambiguouſly drawn, and at all times have in their drawing ſo much affinity with limitations, that it is hard to diſcern and diſtinguiſh them. Know therefore that for the moſt part conditions have conditional words in their frontiſpiece, and do begin therewith; and that amongſt theſe words there are three words that are moſt proper, which in and of their own nature and efficacy, without any addition of other words of re-entry in the concluſion of the condition, do made the eſtate conditional, as *proviſo*, *ita quod*, and *ſub conditione*. And therefore if *A.* grant lands to *B.* to have and to hold to him and his heirs, provided that, or ſo as, or under this condition, that *B.* do pay to *A.* ten pound at Eaſter next; this is a good condition, and the eſtate is conditional without any more words. But there are other words, as *Si, ſi contingat*, and the like, that will make an eſtate conditional alſo, but then they muſt have other words * joined with them, and added to them in the cloſe of the condition, as that then the grantor ſhall re-enter, or that then the eſtate ſhall be void, or the like. And therefore if *A.* grant lands to *B.* to have and to hold to him and his heirs, and if, or but if it happen, the ſaid *B.* do not pay to *A.* ten pound at Eaſter, without more words, this is no good condition; but if theſe or ſuch like words be added, that then it ſhall be lawful for *A.* to re-enter, then it will be a good condition (2).

Co. 2. Lord Cromwel's caſe. 10. Mary Portington's caſe, Co. ſuper Lit. 204. 27 H. 8. 16. Lit. Sect. 328, 329, 330, 331.

Proviſo. Ita quod. Sub conditione.

Si. Si contingat.

* P. 122.

(1) For the diſtinction betwen *a condition in deed*, and a *limitation*, denominated by *Littleton*, a *condition in law*, ſee 2 *Bl. Com.* 155. Alſo the books, referred to in page 114, note 1. and further in *Roll. Abr.* Conditions (K.) *Fearne* on conting. rem. 194, 196, 423. 1 *Atk.* 383. and the caſe of *Aveyln* v. *Ward*, 1 *Veſ.* 420.

(2) See more amply by what words a condition may be created, in *Bac. Abr.* Conditions (A.) and *Vin. Abr.* Condition (C.) (D.) (H.)—If the reader conſiders the very great extent of the title *Condition* in *Viner's Abr.* (being almoſt an entire volume) and the numerous ſubdiviſions thereof, he will not be ſuprized at the frequent references to that book. Mr. *Hargrave*, in his edit. of *Co. Lit.* 9. a. note 3, ſays, "He is the more "frequent in his references to that abridgment, becauſe it tends to facilitate the uſe of that immenſe "body of law and equity; which, notwithſtanding all its defects and inaccuracies, muſt be allowed to be a "neceſſary part of every lawyer's library." The advantages attending frequent references to the abridgments and digeſts, it is preſumed, are too obvious to require to be pointed out: The reader thereby has before him in one view all the caſes on the point, which are by far too numerous to be inſerted in a note, even if they were all correſpondent, and did not vary in their circumſtances or deciſions.

But

Co. ſuper Lit. 146. Co. 2. 70. Dier 152. 311. Lit. Bro. 256. D er 6. 222. Plow. 136. 5 H. 7. 7. Perk. Sect. 732.

But here note that theſe words *proviſo, ita quod*, and *ſub conditione*, albeit they be the moſt proper words to make conditions, yet do they not always make the eſtate by the deed to be conditional, but ſometimes do ſerve for other purpoſes; for the word *proviſo* hath divers operations beſides; for ſometimes it doth ſerve for and work a qualification, or limitation, and ſometimes it doth ſerve to make and work a covenant only (1). And then only (being inſerted amongſt the covenants of the deed) it doth make the eſtate conditional, when there are theſe things in the caſe: 1. When the clauſe wherein it is hath no dependence upon any other ſentence in the deed, nor doth participate with it, but ſtands originally by and of itſelf: 2. When it is compulſory to the feoffee, donee, *&c.* 3. When it comes on the part, and by the words of the feoffor, donor, leſſor, *&c.* 4. When it is applied to the eſtate, and not to ſome other matter; as if one grant a manor with an advowſon appendant, and after the *Habendum* and reſervation of rent, amongſt the covenants, there is this clauſe inſerted [provided that the grantee ſhall regrant the advowſon for the life of the grantor] this is a good condition. And thus it may be alſo a condition, and a covenant: as if the words run thus, provided always, and the feoffee, *&c.* doth covenant, *&c.* that neither he nor his heirs ſhall do ſuch an act, this is both a condition, and a covenant. But if the clauſe have dependence on another clauſe of the deed, or be the words of the feoffee, *&c.* to compel the feoffor to do ſomething, then is it not a condition but a covenant only; as if there be in the deed, a covenant that the leſſee ſhall ſkowre the ditches, and then theſe words follow [provided that the leſſor ſhall carry away the earth:] or if there is a covenant that the leſſee ſhall repair the houſes, and then theſe words follow [provided that the leſſor do provide timber.] So if this clauſe be applied to ſome other thing, and not to the thing granted, then is it no condition, as if a leaſe of land be made rendring rent at *B.* provided that if ſuch a thing happen, it ſhall be paid at *C*; this doth not make the eſtate conditional. Or a leaſe is made for years without impeachment of waſte, *proviſo quod non proſternet domus voluntarie*; in this caſe, howſoever this doth make the priviledge, yet doth it not make the eſtate conditional. Or a leaſe is made for years rendring rent, * provided that the leſſor, ſhall not diſtrain for the rent; in this caſe this is a good condition, but not annexed to the eſtate. So if in a deed of bargain and ſale of land, after the *Habendum*, there are theſe words, *viz.* upon theſe conditions following, *viz.* that if the vendor pay the vendee twenty pound at Eaſter, and enfeoff him of a meadow called *S.* before Whitſontide, that the bargain ſhall be void. Provided nevertheleſs that the bargainer ſhall hold the land for twenty years without the let of the bargainee; it ſeems this Provided, in this caſe, doth not make a condition. So if a leaſe be made of a houſe, and amongſt the covenants theſe words are inſerted, [provided alſo that if the leſſor will dwell upon it, or keep it in his hands, then the leſſee, his executors and aſſigns, doth covenant upon one year's warning to remove and give place to the leſſor, this leaſe notwithſtanding;] it ſeems

Covenant.

* P. 123.

Dier 318.

27 H. 8, 15. Bro. Condition 7.

(1) See accordingly *Co. Lit* 203. b. *Mo.* 307, 707. What ſhall be a condition, and not a covenant. *Bac. Abr.* Condition (G.) *Nelſ. Abr.* Condition (B.)

this is no condition but a covenant only. 2 If a leaſe be made provided that if the rent be behind, without any more words; this is no good condition.

2 Caria paſche 14 Jac. B. R. in the caſe of Muddy Gurum. Co. ſuper Lit. 204.

The word *ſi* alſo doth not always make a condition, for ſometimes it makes a limitation; as when a leaſe is made for years if *I. S.* ſhall live ſo long.

There are other words alſo that in the King's grant, in laſt wills and teſtaments, and other ſpecial caſes do make conditions, as *ea intentione, ad effectum, propoſitum, intentionem*, paying, and the like. So that if one deviſe his land to *I. S. ea intentione, &c.* that he ſhall pay to *W. S.* ten pound, or paying, or ſo as he pay to *W. S.* ten pound, or to ſell, *&c.* theſe are good conditions (1). But theſe words regularly do not make a condition when they are uſed in deeds. And therefore if one make a feoffment in fee *ea intentione, ad effectum, &c.* that the feoffee ſhall do, or not do, ſuch an act; theſe words do not make the eſtate conditional, but it is abſolute notwithſtanding. And yet perhaps theſe words being conjoined with ſome others may make a condition; as if lands be granted *ea intentione quod ſi defecerit &c. tunc quod reintrabit*, or the like (2).

Co. ſuper Lit. 236, 237. Doct. & Stud. 122. Dier 138. Plow. 142. 7 H. 4. 22. Co. ſuper Lit. 204. Co. 10. 42. Dier 318. Doct. & Stu. 34.

Alſo conditions are ſometimes made, eſpecially in eſtates and leaſes for years, without any of theſe formal words, when the apparent intent of the leſſor is to make the eſtate conditional; albeit the words be not uſed as the words of the leſſor, but as the words of the leſſee, or indefinitely of neither. And therefore it hath been ſaid, That if an indenture be made between *A.* and *B.* thus: it is agreed and covenanted between the parties aforeſaid, that *B.* ſhall have the land for years, and that he ſhall not alien it; that this eſtate is conditional: But it ſeems this is not law. (3). But if this clauſe be inſerted amongſt other covenants, *viz.* If the leſſee hinder the leſſor to fell, cut, and carry away the trees upon the lands deviſed, that the leſſor may re-enter and the leaſe ſhall be void; this is a good condition, and ſo it hath been adjudged in the caſe of * *Haward* and *Fulcher*, *Hil.* 3. *Car' B. R.* And if a leſſee for years do covenant in his leaſe, that if he, his executors, or aſſigns, ſhall alien, that it ſhall be lawful for the leſſor to re-enter; it ſeems this is a good condition, and not a covenant only (4). And if a leaſe for years be made, and this clauſe is inſerted in the deed, it is agreed between the parties, that if the leſſee do not pay ten pounds to the leſſor at Eaſter, from thenceforth the leaſe ſhall be void; this is a good condition. And if a leaſe be made with this clauſe inſerted in the deed, it is agreed that whoſoever ſhall have the eſtate or intereſt, that he or they ſhall find ſureties within the year for the rent, otherwiſe the eſtate ſhall ceaſe; it ſeems this is a good condition. And

Doct. & Stu. 94. Dier 6. 91. 63. 92.

* P. 124.

(1) *A.* deviſed lands to *B. paying* 40 *l.* to *C.* it is a good condition; for *C.* has no other remedy, and a will ought to be expounded according to the intent of the deviſor, *Vin. Abr.* Condition (I) *pl.* 9.

(2) A condition may be annexed to a deviſe, as well as to any other conveyance. *Roll. Abr.* Condition (L.) See further by what words a condition may be created in a will, *Bac. Abr.* Condition (B.) and *Com. Dig.* Deviſe (N. 9.)

(3) If leaſe be made to a man and his aſſigns for twenty one years, provided that he ſhall not aſſign, the proviſo being repugnant to the premiſes is void; but it would have been good, if the word *aſſigns* had been omitted. *Moor* 881, cited in *Bac. Abr.* Grants (I.)

(4) And the leſſor may take it as a covenant or condition, but not as both. *Dals.* 8. *Bac. Abr.* Condition (G.)

Dier 66, 65. Curia Mich. 37, 38, Eliz. B. R.

if a leaſe for years be made with this clauſe inſerted, and that it ſhall not be lawful for the leſſee to alien without licence of the leſſor, under pain of forfeiture; this is a good condition.

Dier 79. 27. Co. ſuper Lit. 204.

And if a leaſe for years be made of a houſe, with this clauſe inſerted in the deed, and the leſſee ſhall continually dwell in the ſame houſe upon pain of forfeiture of the ſaid term; this is a good condition.

Plow. 132.

And if in a leaſe for years the leſſee covenant to pay ſo much rent, and then theſe words are inſerted, And if it ſhall happen, that the ſaid yearly rent, *&c.* then the leſſee doth covenant and grant, *&c.* that the leaſe ſhall be void; it ſeems this is a good condition, and ſo hath it been ever taken; as was ſaid by *Juſt. Dodridge, Hil.* 3. *Car'.* And in all theſe caſes the eſtate is conditional.

Co. ſuper Lit. 204. Doct. & St. 94. Dier 65. 138.

But in caſes of feoffments in fee, gifts in tail, and leaſes for life, it ſeems that words penned in this manner will not make conditions, but that in theſe caſes the preciſe and formal words of a condition are requiſite (1). And therefore if a feoffment be made by deed, and therein is inſerted this clauſe, that it is agreed, or that the feoffee doth covenant, that if the feoffor do ſuch an act, the feoffor ſhall reenter; this is no condition, nor the eſtate hereby made conditional. And yet ſee *Perk. Sect.* 744.

Dier 348.

If one make a leaſe for years on condition to pay rent at four feaſts, and after there is a clauſe in the deed, and if the rent ſhall be behind, *&c.* that he ſhall diſtrain; this clauſe doth not take away the condition, but the ſame doth continue, and the eſtate is conditional ſtill. See more in the next queſtion.

Co. ſuper Lit. 204.

In the making of eſtates the cauſe is regarded. And in caſe of the grant of lands or tenements, *cauſa* doth ſometimes make a condition, as if a woman give lands to a man and his heirs, *cauſa matrimonii prælocuti*; in this caſe, if ſhe either marry not the man, or the man refuſe to marry her, ſhe ſhall have the land again to her and her heirs. But on the other ſide, if a man give land to a woman and to her heirs *cauſa matrimonii prælocuti*, though he marry her, or the woman refuſe, he ſhall not have the lands again to him and his heirs. And in the caſe of a grant executory the word [*pro*] may make a * condition. * P. 125.

Co. ſuper Lit. 204. Co. 10. 42. Plow. 141. 9 Ed. 4. 19. 15 Ed. 4. 2. Dier 6.

And therefore if a man grant me an annuity *pro una acra terræ*, or *pro decimis*, *&c.* or if he grant me an annuity for a way, or a gutter through my ground, this is conditional, and if he be diſturbed in the way, acre of land, tithes, or gutter, he may refuſe to pay the annuity. So if an annuity be granted to an officer for the executing of his office; or *pro conſilio impendendo*, if the grantee do not execute the office, or give counſel, *&c.* the annuity ſhall ceaſe (2). But if one grant me tithes, or an annuity, and I grant an annuity for theſe tithes, or grant to give counſel for the annuity; it ſeems the grants that are in this manner are not conditional, but abſolute. So if I *pro conſilio &c.* or *pro una acra terræ, &c.* make a feoff-

(1) Words of *an expreſs condition*, ſhall not ordinarily be conſtrued as a *limitation*; but where an eſtate is to remain over for breach of a condition, which is by expreſs words *a condition*, yet it it ought to be intended as a limitation, *per Holt* 11 *Mod.* 61. *Page* and *Hayward.* 2 *Salk.* 570. S. C.

(2) Regularly the word *pro* does not import a condition; but when *the thing granted is executory*, and the conſideration of the grant is a ſervice, or ſome ſuch thing for which there is no remedy, but ſtopping the thing granted; *as in the caſe of an annuity granted pro conſilio, &c.* the word *pro* has the force of a condition, but not of a condition *precedent*, and therefore the performance thereof need not be averred when the annuity is demanded; but in the caſe of a perſonal contract, as, if I ſell you my horſe for 10*l.* it works by condition *precedent*, and you ſhall not take my horſe, except you pay me 10*l.* *per Hobart* Ch. J. *Hob.* 41.

Teſtament.

ment in fee, or leaſe for life of another acre, theſe eſtates are not conditional. And if one deviſe land to be ſold by his executors, and to be diſtributed for his ſoul; by this it ſeems the eſtate or power of the executors is conditional. So if one deviſe his land to find a preacher or a chaplain. But otherwiſe it ſeems it is of land ſo conveyed by deed in a man's life time. And if a feoffment be made of land *ad erudiendum filium*; ſome have ſaid this eſtate is conditional.

Dier 7. 127. See Teſtament.

Plow. 141. 142.

Limitation.

The moſt apt and proper words to make a limitation of an eſtate, are, *Quamdiu*, *dummodo*, *dum*, *quouſque*, *ſi*, and ſuch like. And therefore if *A.* grant lands to *B.* to have and to hold to him and his heirs, until *B.* go to *Rome*; or until he be promoted to a benefice; or until *B.* pay to *A.* or *A.* pay to *B.* twenty pounds; or ſo long as *I. S.* ſhall live; or if *A.* grant lands to *B.* to have and to hold to him, his executors, *&c.* if *I. S.* and *I. D.* ſhall live ſo long. Or if *A.* grant lands to *B.* to have and to hold to him for the life of *B.* ſo that *B.* pay twenty pounds to *A.* at Eaſter following; theſe are not conditional, but limited to eſtates. So if *A.* grant lands to *B.* to have and to hold to him, for ſo long as he ſhall keep himſelf a widower, or *dum ſola fuit*, or *durante viduitate*, if the grantee be a widow, theſe are good limited eſtates, but theſe words do not make the eſtates to be conditional (1).

Co. ſuper Lit. 234. 235. Co. 10. 42 Plow. 413. Lit. Sect. 90. Dier 290.

If the words in the cloſe or concluſion of a condition be thus, That the land ſhall return to the feoffor, *&c.* or that he ſhall take it again, and turn it to his own profit: or that the land ſhall revert, or that the feoffor ſhall *recipere* the land; theſe are either of them good words in a condition to give a re-entry, as good as the word [*re-enter*] and by theſe words the eſtate will be made conditional.

Dier 125. Plow. 159. Perk. Sect. 740.

6. What ſhall be ſaid a condition in law, and when an eſtate ſhall be ſubject to ſuch a condition.

The tenant by the curteſy, the tenant in tail after the poſſibility of iſſue extinct, the tenant in dower, the tenant for life, the tenant for years, by ſtatute, or elegit, gardian, *&c.* do hold their eſtates ſubject to a condition in law (2); ſo that if either of them alien his land in fee, or claim a greater eſtate in a court of record than his own, he doth forfeit his eſtate, and he in remainder or * reverſion may enter; and if ſuch a tenant do waſte, he in reverſion ſhall recover the place waſted (3). The

Co. ſuper Lit. 233. 234. Co. 8. 44.

* P. 126.

(1) See accordingly *Co. Lit.* 42. a. 13 *edit.* and *note* 6. thereto. — Deviſe of lands by a teſtator to his wife *durante viduitate*, is not a bar of her dower. *Lawrence* v. *Lawrence Dom. Proc.* 16.th *May* 1717.

(2) Which is diſtinguiſhed from a condition in deed, it being that which is implied by law, without any expreſs words in the deed. *Co. Lit.* 232. b.

(3) Waſte is either *voluntary* or *actual*, as by pulling down a houſe; or it is *permiſſive*, as by ſuffering it to fall for want of neceſſary repairs, 2 *Inſt.* 145. An action of waſte lies againſt tenant by the curteſy, in dower, for life, *&c.* by him that hath the immediate eſtate of inheritance, for waſte, or deſtruction in houſes, gardens, woods, trees, or in land, meadows, *&c.* to the diſheriſon of him in reverſion, or remainder, *Co. Lit.* 53. a. The doctrine of waſte, tho' very material, is but little explained in the *Touchſtone*. It is not within the compaſs of a note to ſupply the deficiency. The editor will therefore content himſelf by referring the reader to ſome authors reſpecting waſte, under the four following general heads, in order to facilitate his inquiry into any particular point of that doctrine.

1ſt. What ſhall be deemed waſte and its different kinds, *Co. Lit.* 53. a. 5 *Co.* 12. *Com. Dig.* Waſte (D. 1.) 2 *Roll. Abr.* 814. 2 *Bl. Com.* 281. *Bac. Abr.* Waſte (A.) Obſervations upon eſtates for life reſpecting waſte. octavo, printed for *Uriel*, 1777.

2d. Of what things, and in what manner, waſte may be made. 5 *Co.* 12. 21. 7 *Co.* 15. *Vin. Abr. Waſte* (C) and (D.) *Bac. Abr.* Waſte (C.)

3d. By whom, and againſt whom, remedy may be had for it, *Co. Lit.* 285. a. 2 *Roll. Abr.* 824. 6 *Co.* 37, b. 11 *Co.* 49. *Wright's Ten.* 44. 2 *Inſt.* 299. Stat. 6 *Ann. c.* 31. *Bac. Abr.* Waſte (G.) (H.) 3 *Bl. Com.* 223. *Com. Dig.* Waſte (C. 1.) 1 *Vez.* 521. 2 *Atk.* 383.

4th. At what time, and in what manner, that remedy may be obtained, *Co. Lit.* 356. a. *Br. Abr.* Waſte *pl.* 42. *F. N. B.* 59. 2 *Inſt.* 146. 306. *Bac. Abr.* Waſte (I.) *Vin. Abr.* Waſte (M. 3.) (*L. a.*) In what caſes *Injunction* granted, *Vin. Abr.* Waſte (R. a.) *Eq. Ca. Abr.* Waſte. 1 *Vez.* 546. 2 *Atk.* 183.

tenant in feeſimple doth hold his eſtate ſubject to a condition in law; ſo that if he alien his land in mortmain, he doth forfeit it, and the Lord may enter upon him. So alſo he that doth take land in exchange, doth hold it under a condition in law, *viz.* that if the land he give in exchange for that land be recovered from him that hath it, that he ſhall enter upon his own land again. Alſo every officer that hath to do in the adminiſtration of juſtice, all keepers of parks, ſtewards, beadles, bailiffs, and ſuch like, hold their offices under a condition in law; ſo that if they do not duly execute it, and do not all that thereunto doth appertain, they may forfeit them, and the grantor may put them out. *In quo quis delinquit in eo eſt de jure puniendus* (1).

7. What ſhall be ſaid a good condition in deed or limitation in its original creation; and what not.
1. For the manner, frame, and order of making it.

To every good condition is required an external form, *i. e.* words to declare an intent in the party to have the eſtate conditional, as in the caſes before: and an internal form, *i. e.* ſuch matter as whereof a condition may be made.

Perk. Sect. 717. Co. 1. 113. Plow. 133. Co. ſuperLitt. 146. 217. Co. 2. 71.

As to things executed, the condition muſt be made and annexed to the eſtate at the time of the making of it; but as to things executory, it may be made afterwards. And if the condition be made in another deed, and not the ſame deed wherein the eſtate is made, if it be delivered at the ſame time, it is as good as if it were contained in the ſame deed. And therefore if a man make a feoffment, leaſe, or the like, by one deed abſolute, and at the ſame time make another deed of defeaſance or condition, and deliver both together, this is a good condition, and will make the eſtate conditional. But if the defeaſance be ſealed and delivered before, or after the deed, *contra*. And therefore if one make an abſolute feoffment in fee, and before or after the ſealing or delivery of that deed, the feoffor declare himſelf by deed, or the feoffor and feoffee agree by deed, that the eſtate made before, or to be made after, ſhall be conditional, yet this is not conditional. And yet if an annuity be granted abſolutely by one deed, and after the grantee grant to the grantor, that if the grantor do ſuch a thing, the annuity ſhall ceaſe: in this caſe the annuity is conditional (2).

Co. 146. Hil. 40. Jac. B. R. Warner's caſe Co. 1. 112. Albanies caſe.

A condition may be annexed to an eſtate by way of uſe; as if a feoffment be made to *A.* to the uſe of *B.* and his heirs, on condition that *B.* ſhall pay to the feoffor twenty pounds ſuch a day; this is a good condition. So if one covenant to ſtand ſeiſed of lands to the uſe of *B.* and his heirs, on condition that if he pay him ten pounds, the uſe ſhall be void, or the like.

Dier 126. 348.

Alſo a condition may be annexed to an eſtate created by will; as if one deviſe land to *I. S.* for his life, provided that he pay ten pounds yearly to *I. D*; this is a good condition. Whereof ſee in *Teſtament*.

Co. 8. 17. 24 Ed. 3. 29.

A rent, or any ſuch like thing may be granted on condition, that * if ſuch a thing be or be not done, the rent ſhall ceaſe for a time, and then revive again, and this condition is good. But in caſe of land it is otherwiſe; for that cannot be granted

* P. 127.

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(1) In like manner to all *Franchiſes* there is a condition in law annexed, that they ſhall not be miſuſed. *Mir. ch.* 5. § 4. 2 *Inſt.* 223. *Com. Dig.* Condition (R.) What ſhall be deemed a breach of a condition in law, ſee in *Com. Dig.* Condition (S).

(2) Alſo rents, conditions, warranties, and ſuch like, *inheritances executory*, may be defeated by defeaſance made either at that time, or at any time after—and ſo the law is of ſtatutes, recognizances, and other things executory, *Co. Lit.* 237. a.

after

after this manner. Alſo a condition to make an eſtate void for a part of the time is not good. And therefore if a feoffment be on condition, that upon ſuch a contingent the feoffor ſhall enter, and have the land for a time, or the eſtate ſhall be void for a part of the time; or make a leaſe for ten years, provided that upon ſuch a contingent it ſhall be void for five years; theſe conditions are not good. And yet if a feoffment be made of two acres, provided that upon ſuch a contingent the eſtate ſhall be void as to one acre only; this is a good condition (1).

Co. 1. 86. Perk. Sect. 718. Co. 4. 121. Dier 6.

A condition that a ſtranger, or the heir of the feoffor, ſhall do an act, is good; as if a feoffment be made to *I. S.* on condition that *I. D.* ſhall pay to the feoffor ten pounds at Eaſter next; or if a feoffment be made on condition that if the heir of the feoffor pay twenty ſhillings to the feoffee, that the feoffor and his heirs ſhall re-enter. But a condition to give a ſtranger a re-entry is void ſo far forth. And therefore if an eſtate be made upon condition, that upon ſuch a contingent a ſtranger ſhall enter, or the eſtate ſhall ceaſe, and another ſhall have it; howſoever this may be ſo drawn, as it may be a good condition to give him, his heirs, *&c.* that doth make the eſtate, an entry, yet it cannot be good to give the eſtate, or the entry, to the ſtranger. So if a feoffment be made on condition that upon ſuch a contingent the feoffor and a ſtranger ſhall enter; this is not good to give an entry to the ſtranger, but it is good to give the feoffor a re-entry. And yet by will a man may deviſe a term after this manner.

Co ſup'r Lit 214. Doct. & Stud. 94. 159. 100. Co ſuper Lit. 379. Co. 1. 84. Dier 3'. 21 H. 7. 11. Dier 4. Co. 8. 95.

If a man enfeoff another, upon condition that he and his heirs ſhall render to a ſtranger and his heirs a yearly rent of twenty ſhillings, *&c.* and if he fail of payment thereof, that the feoffor ſhall re-enter; albeit this as a reſervation of rent is merely void, and the condition that doth call it a rent, is merely miſtaken, yet the condition is good, and *ut res valeat* the words ſhall be taken contrary to their proper ſenſe.

Co. ſuper Lit. 213.

If I enfeoff *I. S.* of land on condition that if *I. D.* give to him ten pounds, or go to *Rome* before ſuch a day, *&c.* that then the feoffee ſhall pay to me ten pounds, *&c.* this is a good condition.

Perk. Sect. 798.

If a feoffment be made to one and his heirs, on condition that if the feoffee pay to the feoffor ten pounds, he ſhall have the fee of the land; this is not a good condition. But if he ſay further, and if he fail to pay that, the feoffor ſhall re-enter, this is good (2).

Co. ſuper Lit. 207.

If a gift in tail be made to a man and the heirs of his body, and if he die without heirs of his body, that then the donor and his heirs ſhall re-enter; this is a void condition, for when the iſſues fail, the eſtate is at an end.

Co. ſuper Lit. 224.

* P. 128. * Conditions that are ſo penned, as they are inſenſible and altogether incertain, are void: as if one make a leaſe on condition that if the rent be behind to reſtrain, and if there be not ſufficient, the ground to enter into the premiſſes; this condition is void for inſenſibility, and the eſtate is abſolute. *Et ſic de ſimilibus.*

Muddy & Gardner's caſe. Adjudged paſche 14. Jac. B. R. Co. 6. 41.

(1) Feoffment of two acres *upon condition*, and that for breach he may re-enter in one, this is a good condition. *Vin. Abr.* Condition (N.)

(2) The addition of the ſubſequent words being material, as the feoffee had a fee ſimple by the former words. *Co. Lit.* 207. b.

Co. 8. 75. Plow. 477. 481. Lit. Sect. 350. Perk. Sect. 710. Plow. 135. 10 Aſſ. pl. 15. Perk. Sect. 745. 707. Plow. 25. Lit. Sect. 707. 350. Plow. 272. 482, 483. 4 H. 7. 4. See more in the Lord Stafford's caſe, Co. 8. 73.

To enlarge an eſtate.

A condition to enlarge or encreaſe an eſtate may be good, as if a gift be made in tail, or a leaſe be made for life, or years, on condition that if ſuch an act be done, or not done, the leſſee ſhall have the land to him and his heirs, as if one make a leaſe for life to one, and if the leſſor die without heir of his body, then he doth grant the land to the leſſee and his heirs for ever (1). Or if land be granted to a man for five years, on condition that if the grantee pay to the grantor within the two firſt years ten pounds, then that he ſhall have the fee-ſimple, otherwiſe that he ſhall have the land but for five years, and livery of ſeiſin be made according to the deed; this is a good condition, and by this upon the performance of the condition the fee-ſimple will paſs. So if one grant land for five years rendring rent, and that if the leſſee will hold it over to him and his heirs, that he ſhall pay twenty pounds rent; this is a good condition, and if he pay the rent, he ſhall have the fee-ſimple. So if a man make a leaſe for years, and at the ſame time, for the ſurety of the term to the leſſee, makes a feoffment to him, upon condition that if he be diſturbed in his term, he ſhall have the feeſimple of the land, and deliver both theſe deeds at one time, and give livery of ſeiſin accordingly; this is a good condition. So if a leaſe for life be made upon condition, that if the leſſor or his heirs, pay to *B.* or his heirs, ten pounds at a certain day, that then the leſſor may re-enter, and if he do not pay it at that time, and the leſſee pay to the leſſor or his heirs ten pounds at a certain day, after the former day, that then the leſſee ſhall have the land to him and his heirs for ever; this is a good condition. But in all caſes where theſe kind of conditions are good to make the increaſed eſtate good, there muſt be theſe things in the caſe. 1. There muſt be a precedent particular eſtate, as an eſtate in tail, for life, or years, for a foundation to erect the ſubſequent eſtate upon, and that firſt eſtate alſo muſt be certain and irrevocable, not upon contingency, or with power of revocation. 2. The privity muſt remain until the time of the performance of the condition, for if the donee or leſſee do grant away the firſt eſtate, the condition cannot afterwards be performed, to effect and produce the encreaſing eſtate. 3. The ſubſequent eſtate muſt veſt *eo inſtanti*, when the contingency upon which the condition dependeth, ſhall happen, or never. 4. The firſt and ſecond eſtate muſt take effect by one and the ſame deed, or elſe by two deeds delivered at the ſame time, for *quæ incontinenti fiunt ineſſe videntur*. 5. The condition upon which the increaſe is, muſt * be poſſible and lawful, for upon an impoſſible condition it cannot, and upon an unlawful condition it ſhall not, increaſe (2).

* P. 129.

Co. 1. 155. Dier 150.

If one make a leaſe for life, provided that if the leſſee die within ſixty years, that his executors ſhall have the land for ſo many of the ſixty years as ſhall be to come at the time of his death; this is no good condition to make the eſtate to increaſe, but it may be a covenant. And if a leaſe for years be made, on condition that if the leſſor ſell the reverſion of the ſame land,

Co. 1. 84.

Covenant.

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(1) And ſuch a grant will be good, as well of things which lie in grant, as of things which lie in livery, and may be annexed as well to an eſtate tail, which cannot be drowned, as to an eſtate for life or years, which may be merged by the acceſs of a great eſtate. *Fearne on Cont. Rem.* 203.

(2) The firſt four of theſe requiſites, and the reaſons for them, are mentioned in Ld. *Stafford's* caſe, 8 *Co.* and in *Fearne in Cont. Rem.* 204. but the 5th doth not appear to be ſpecified in either of thoſe books.

the leſſee ſhall have the fee of it; this is no good condition to increaſe the eſtate. And a poſſibility cannot increaſe upon a poſſibility, as a leaſe for years to a leaſe for life, by one contingent, and the leaſe for life to a feeſimple, by another. And if a leaſe be made to a man and a woman for their lives, on condition that which of them two ſhall firſt marry, that one ſhall have the fee, and they intermarry; in this caſe neither of them ſhall have the fee for incertainty. Co. 8. 75. Co. ſuper Lit. 218.

To abridge an eſtate. If a man make a leaſe for life, and add this condition, that if the leſſee within one year do not pay twenty ſhillings, that he ſhall have but a term of two years, and he do not pay the 20*s.* by this his leaſe for life is gone, and he hath now but a leaſe for two years. Co. ſuper Lit. 218. 50 Ed. 3. 27.

2. For the matter and ſubſtance of it. If a leaſe be made, on condition that if a ſtranger diſlike it, or be diſcontented with it, that the leaſe ſhall be void; this is a good condition. 1 H. 8. 13.

If a leaſe be made, on condition that if a leſſee be outlawed, the leaſe ſhall be void; it ſeems this is a good condition. Hil. 6 Ja. B. R. Curia.

Prerogative. If a feoffment be made, on condition that if the feoffee commit treaſon, that the feoffor ſhall re-enter; in this caſe the condition is vain, for if the feoffor enter, his entry is not lawful, for the King is intitled, and his title ſhall be preferred. Trin. 3 E. 6. per Curiam.

Teſtament. Uſe. No condition or limitation, be it by act executed, limitation of a uſe, or by deviſe, or laſt will, that doth contain in it matter repugnant, and tending to the utter ſubverſion of the eſtate, or matter that is againſt law, or matter that is impoſſible to be done, is good. And therefore in all ſuch caſes if the condition be ſubſequent, the eſtate is abſolute, and the condition void: And if the condition be to go before the eſtate, the eſtate and the condition both are void. Co. 1. 83. 6. 43. Co. 9. 128.

Repugnant conditions. If a feoffment or other conveyance be made of land, or a grant of rent, *&c.* in feeſimple, by deed or will, upon condition that the feoffee or grantee ſhall not alien to certain perſons, as to *I. S.* or to *I. S.* and *W. S.* this is a good condition (1). So if one make a feoffment in fee of land, on condition that the feoffee ſhall not alien it in mortmain; this is a good condition (2). So if *A.* be ſeiſed in fee of black acre, and *B.* doth infeoff *A.* of white acre in fee, on condition that he ſhall not alien black acre; this is a good condition. But if the condition be that the feoffee or grantee ſhall not alien the thing granted to any perſon whatſoever, or that if he do alien to any perſon, that he ſhall pay a fine to the feoffor; theſe conditions are void in * the caſe of a common perſon as repugnant to the eſtate (3). Co. ſuper Lit. 223.

To reſtrain alienation.

* P. 130.

Prerogative. But in caſe of the King, ſuch conditions are good. And in the caſes of a common perſon alſo the alienation is good until it be avoided by the feoffor. And in *Paſc.* 19 *Jac. B. R.* it was held by Juſt. *Dodridge* and *Chamberlain*, that if a feoffment be on condition that if the feoffee alien, he ſhall pay 10*l.* to the feoffor, that this is a good condition: but Ch. Juſt. and Juſt. *Haughton* held the contrary, for then this ſhall be a circumvention of the law. If a gift had been made to an Abbot, Bragg and Tanner's caſe.

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(1) And the grantee may be alſo reſtrained from alienating for a particular time. *Lorge's* caſe. 2 *Leon* 82, and 3 *Leon.* 182.

(2) Becauſe ſuch alienation is prohibited by law, and regularly, whatever is prohibited *by law*, may be prohibited by condition, be it *malum prohibitum*, or *malum in ſe*, *Co. Lit.* 223. b.

(3) And the law is the ſame in a deviſe in fee, upon condition that the deviſee ſhall not alien; or in any conveyance whereby a fee ſimple doth paſs, *Co. Lit.* 223. a.

and

Doct. & St. 124.

and his ſucceſſors, on condition not to alien, this had been a good condition.

Co. ſuper Lit. 224. 10 H. 7. 11. 13 H. 7. 23. Co. 10. 30. Perk. Sect. 739. 21 H. 6. 33.

If one make a feoffment of land to an infant, on condition he ſhall not alien to any perſon; this is a good condition during the minority of the infant, but not afterwards. In like manner as if one make a feoffment to a huſband and wife, on condition they ſhall not alien; this condition to ſome intent is good, *i. e.* to reſtrain alienation by feoffment or deed, and to ſome intent repugnant and void, *i. e.* to reſtrain alienation by fine, for that is lawful. So if a gift be made in tail, on condition that the tenant in tail may alien for the profit of his iſſues; this is a good condition. And ſo if land be given in tail, upon condition that the tenant in tail or his heirs ſhall not alien in fee-ſimple, fee-tail, nor for the term of any others life, but for their own lives; this condition is good. But if lands be given in tail on condition, that the tenant in tail, or his heirs in tail ſhall not ſuffer a common recovery, levy a fine with proclamations according to the ſtatutes of 4 *H.* 7. and 32 *H.* 8. to bar the iſſues, or on condition that he ſhall not make copyhold eſtates of copyhold land, according to the cuſtom of the place, or make leaſes according to the ſtatute of 32 *H.* 8. *ca.* 28. theſe conditions are held to be repugnant, and for that cauſe void (1). And yet ſee, for the laſt of theſe caſes, the opinion in *Co. ſuper Lit.* 223. to be contrary, and that a condition to reſtrain the making of ſuch leaſes is good; for this power is not incident to the eſtate, but given to him collaterally by the ſtatute, and *Quilibet poteſt renunciare juri pro ſe introducto.* But *tota curia* in *Mary Portington's* caſe is againſt him (2). If a man make a gift in tail to *A.* the remainder to him and his heirs, on condition that he ſhall not alien; this condition as to the eſtate tail is good, and void as to the other. And therefore if an alienation be, he ſhall defeat it only as to the eſtate tail. And if a man make a gift in tail, on condition that the donee or his heirs ſhall not alien; this is a good condition to ſome intents, and void to other, and therefore if he make a feoffment in fee, or any other eſtate by which the reverſion is diſcontinued tortiouſly, the donor ſhall enter, otherwiſe if he ſuffer a common recovery. And a gift in tail, on condition that the tenant in tail ſhall not make a leaſe for his own life, is not a good condition, by *Co.* 6. 43. againſt *Co. ſuper Lit.* 223. If one ſeiſed in fee of land, make a leaſe of it for years, or life, on condition that the leſſee ſhall not alien the land leaſed, or any part thereof, during the term, or on * condition that he ſhall not alien it, or any part of it, during the term without licence of the leſſor; theſe are good conditions. So if one be ſeiſed in fee of a manor, and he make a leaſe of years of it to *I. S.* on condition that he ſhall not make voluntary eſtates by copy; this is a good condition. But in a feoffment in fee ſuch a condition is repugnant and void. And if one be poſſeſſed of a leaſe for years, or of a houſe, or of any other chattel real or perſonal, and he give or ſell all his intereſt therein, upon con-

Dier. 48. Co. 6. 43.

Co. ſuper Lit. idem Dier 227.

Co. 6. 43.

Co. 6. 43. 4. 84. ſuper Lit. 223.

* P. 131.

(1) See accordingly power to ſuffer a recovery cannot be reſtrained by condition. 1 *Burr.* 84. It was reſolved in *Sonday's* caſe, 9 *Co.* 128. that no condition or limitation, be it by act executed or by limitation of any uſe, or by a deviſe in a laſt will, can bar tenant in tail from aliening by a common recovery. See alſo *Foy* v. *Hinde*, *Cro. Jac.* 697.

(2) 10 *Co.* 39. a.

dition

dition that the donee or vendee ſhall not alien the ſame; this condition is void for repugnancy, and the gift or ſale is abſolute.

If one make a feoffment of land in fee, on condition that the feoffor ſhall retain the land for twenty years without interruption; it ſeems this is a good condition and not repugnant. Co. 2. 72. Dier 312.

If I grant land to another for life, if it ſhall pleaſe me ſo long to ſuffer him; it ſeems this condition is repugnant and void. Dier 94.

If a feoffment be made of land in fee, on condition that the feoffee ſhall not enjoy the land, or ſhall not take the profits of the land, or on condition that the heir of the feoffee ſhall not inherit the land, or on condition that the feoffee ſhall not do waſte, or on condition that his wife ſhall not be endowed; in all theſe, and the like caſes, the condition is void as repugnant to the eſtate. Co. 10. 39. ſuper Lit. 206. Plow. 77. 133. 21 H. 7. 8. 8 H. 7. 10. Perk. Sect. 731.

If a gift in tail be made, on condition that the donee or his iſſues ſhall not take the profits of the land, or on condition that if the donee die, his eſtate ſhall go unto another, or on condition that their wives ſhall not be endowed, or on condition that they ſhall not do waſte, or on condition that warranty and aſſets, or a collateral warranty, ſhall not bar the iſſues in tail; all theſe conditions are repugnant and void. Co. 6. 41. 1. 84. ſuper Lit 224.

If lands be given or granted to two and their heirs, on condition that the ſurvivor ſhall have the whole notwithſtanding partition, or on condition that the ſurvivor ſhall not have the whole albeit there be no ſeverance; theſe conditions are repugnant and void. Co. 1. 84.

If one make a leaſe for life, on condition that the leſſee ſhall not do fealty; this condition is not good. Perk. fol. 141.

If lands be given to one and the heirs males of his body, provided that if he die without heirs females of his body, that the donor ſhall re-enter; this condition is repugnant and void. Co ſuper Lit. 204.

If one have land in poſſeſſion, or reverſion, and he grant a rent out of it, on condition that the grant ſhall not charge the perſon of the grantor; this is a good condition, and not repugnant. But if a man grant a bare annuity, or grant a rent charge out of another man's land with ſuch a condition, or if one grant a rent charge, on condition that the grantee ſhall not diſtrain, nor charge the perſon of the grantor, or if one grant a rent out of land, on condition that the land ſhall not be charged with it; all theſe conditions are repugnant and void. Co. ſuper Lit. 146. 10 H. 7. 8. Co. 6, 41. 5 H. 7. 7. 7 H. 6. 44. Perk Sect. 732.

* P. 132. So if two grant a rent charge out of land, provided * that it ſhall not extend to one of them; this condition is repugnant and void.

If a man ſeiſed in fee of land make a leaſe for years rendring rent, and after the leſſee makes a leaſe to the leſſor of other land, on condition that he ſhall not diſtrain for his rent in the former leaſe made to this leſſee; this is a good condition, and not repugnant. Perk. Sect. 733.

If one make a feoffment in fee, or leaſe for life, with warranty, on condition that the feoffee or leſſee ſhall not vouch to warrant, nor recover in value, or if the leaſe be made without impeachment of waſte, on condition that if the leſſee do waſte Perk. Sect. 734. Dier 47.

the leſſor ſhall re-enter; theſe are good conditions, and not repugnant (1).

Co. ſuper Lit. 223, 224. 207. Perk Sect. 722. 723.

Conditions againſt law.

All conditions annexed to eſtates, being compulſory to compel a man to do any thing that is in its nature good or indifferent, or being reſtrictive to reſtrain or forbid the doing of any thing which in its nature is *malum in ſe*, as to kill a man, or the like, or *malum prohibitum*, being a thing forbidden by any ſtatute, or the like, all ſuch conditions are good, and may ſtand with the eſtates. But if the matter of the condition tend to provoke or further the doing of ſome unlawful act, or to reſtrain or forbid a man the doing of his duty; the condition for the moſt part is void (2). And therefore if lands be given or granted to a man, upon condition that he ſhall kill a man, or upon condition that he ſhall burn his neighbours houſe, or upon condition that he ſhall forſwear himſelf, or upon condition that he ſhall ſave and keep harmleſs the grantor whatſoever he ſhall do, or that if he do not theſe things, the grant ſhall be void; this condition is void (3). Or if lands be given or granted to an officer, upon condition that he ſhall not duly execute his office; this condition is againſt law, and void: *Et ſic de ſimilibus.* So if a gift be made in tail, upon condition that the donee ſhall diſcontinue, or one give or grant land, on condition that the grantee ſhall be a foreſtaller againſt the ſtatutes; theſe and ſuch like conditions are void. And hereupon it is, that conditions annexed to land, that the profits thereof ſhall be employed to ſuperſtitious uſes, are void. And hence alſo it is that ſuch conditions as are againſt the liberty of law, as that a man ſhall not marry, or the like, are void. And hence alſo ſuch as are againſt the public good. And therefore it ſeems if one grant his land to *I. S.* on condition that he (being a huſbandman) ſhall not ſow his arable land; this condition is void (4). And in all theſe caſes if the condition be ſubſequent to the eſtate, the condition only is void, and the eſtate good and abſolute; if the condition be precedent, the condition and eſtate both are void, for an eſtate can neither commence nor encreaſe upon an unlawful condition.

Perk. Sect. 727.

Co. 1. 24. qu. 6. 43.

Dier 343. Co. ſuper Lit. 206.

Co. 11. 53, 7 Ed. 3. 65.

Perk. Sect. 722. 725.

* Co. 6. 41. ſuper Lit. 207. 219. 206. Dier 252. 262. Plow. 152. Perk. Sect. 935. 729, Plow. 272. 286. Co. 1. 84. ſuper Lit. 207.

Conditions impoſſible.

* All conditions annexed to eſtates, that contain in them matter at the time of making of them impoſſible to be done, are void. And therefore if one give or grant land, on condition that a man ſhall go to *Rome* in three days, or on condition

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(1) And in caſe of any repugnancy or inconſiſtency, the condition or limitation muſt determine or avoid the whole of the eſtate to which it is annexed; and not determine it in part only, and leave it good for the reſidue. See *Fearne* on *Cont. Rem.* 3d edit. 178. and further as to *repugnant conditions*, *Vin. Abr.* Condition (Z.) *Bac. Abr.* Condition (L.) and *Com. Dig.* Condition (D. 4.)

(2) The law diſtinguiſheth between a condition againſt law for the doing any act that is *malum in ſe*, and a condition againſt law that concerns not any thing that is *malum in ſe*, but is therefore *againſt law* becauſe it is *repugnant to the eſtate*, or againſt ſome maxim or rule in law; when therefore it is ſaid that if the condition of the bond be againſt law, that the bond itſelf is void; it muſt be underſtood of a condition againſt law for the doing of ſome act that is *malum in ſe*; and yet therein alſo the law diſtinguiſhes; as if a man be bound upon condition that he ſhall kill *J. S.* the bond is void; but if a man makes a feoffment upon condition that he ſhall kill *J. S.* the eſtate is abſolute and the condition void. *Co. Lit.* 206. b. See alſo *Carpenter* v. *Beer*. *Comberb. Rep.* 246.

(3) Condition to do any thing which amounts to *maintenance*, is void; as to ſave *A.* harmleſs from ſuch appeal of robbery as *B.* hath againſt him; this condition is againſt law. 18 *E.* 4. 28. *Roll. Abr.* 417.

(4) See more amply as to conditions *againſt law*, and therein, particularly as to bonds of reſignation, what condition therein will make them void, and in what caſes equity will grant a perpetual injunction againſt them, in *Bac. Abr.* Condition (K.) *Eq. Ca. Abr.* Bonds (C.) *Com. Dig.* Condition (D. 7.) *Vin. Abr.* Condition (Y.)

* P. 133. that a man ſhall infeoff * a corporation, when there is none ſuch; or if one give lands in tail, on condition that the eſtate ſhall ceaſe, as if the tenant in tail be dead; or if one grant lands, on condition that a man ſhall infeoff his wife; all theſe and ſuch like conditions are void. And in theſe caſes alſo if the condition be ſubſequent, the condition is void only, and the eſtate is abſolute; and if the condition be precedent, the condition and the eſtate both are void; for an eſtate can neither commence nor increaſe upon an impoſſible condition. And if the thing to be done by the condition be poſſible at the time of the making of the condition, and do afterwards by the act of God become impoſſible; the condition is become void, and the eſtate abſolute (1); as if a feoffment be made, on condition that the feoffee ſhall before Eaſter following enfeoff the feoffor, and the feoffee die before the day; or on condition that the feoffee ſhall appear in ſuch a court before or at Eaſter, and he die before the time; in theſe caſes the condition is gone, and the eſtate is abſolute (2).

Limitation. And the ſame law is for the moſt part of limitations, if they be repugnant, impoſſible, or againſt law, as is before ſhewed to be of conditions. See more in the next diviſion following. Co. 6. 41. 1. 84.

8 How a condition in deed or a limitation ſhall be taken & expounded. And how it muſt and ought to be performed.

It is a general rule, that ſuch conditions annexed to eſtates as go in defeaſance, and tend to the deſtruction of the eſtate, being odious to the law, are taken ſtrictly, and ſhall not be extended beyond their words, unleſs it be in ſome ſpecial caſes (3). And therefore if a leaſe be made, on condition that if ſuch a thing be not done, the leſſor [without any words of heirs, executors, *&c.*] ſhall re-enter and avoid it; in this caſe regularly the heir, executor, *&c.* ſhall not take advantage of this condition. So if one make a leaſe for years of a houſe, on condition that if the leſſor ſhall be minded to dwell in the houſe, and ſhall give notice to the leſſee, that he ſhall depart; in this caſe if the leſſor die, his heir, executor, *&c.* ſhall not have the like advantage and power as the leſſor himſelf, for the condition ſhall not be extended to them. Co. 8. 90. ſuper Lit. 219. 27 H. 8. 14.

1. In reſpect of perſons.

Not to alien. And hence it is, that if a leaſe for years be made, on condition that the leſſee ſhall not alien without the licence of the leſſor; in this caſe the reſtraint ſhall continue only during the lives of the leſſor and leſſee and no longer. Dier 66.

And yet this rule hath an exception; for if a man mortgage his land to *W.* upon condition that if the mortgagor and *I. S.* pay 20*s.* ſuch a day to the mortgagee, that then he ſhall re-enter, and the mortgagor die before the day; in this caſe *I. S.* may pay the money and perform the condition. Co. ſuper Lit. 219.

To pay money. But otherwiſe it is whiles the mortgagor doth live, for in that time *I. S.* alone without him may not tender it, and if he do, this tender is no performance of the condition. And in caſe where a condition doth tend to create an eſtate, there it ſhall have the moſt favourable expoſition that may be; and Lit. ſect. 352 Co. ſuper Lit. 219. Co. 8. 60.

(1) See accordingly the caſe of *Thomas* v. *Howel.* 4 *Mod.* 66. *Skin.* 301.

(2) When a condition conſiſts of two parts in the disjunctive, and both are poſſible at the time of making the condition, and afterwards one of them becomes impoſſible by the act of God, a performance of the other is not compellable, 5 *Co.* 22. a. 3 *Mod.* 233. See further as to conditions *impoſſible*, in *Vin. Abr.* Condition (C. a.) *Bac. Abr.* Condition (M.) *Com. Dig.* Condition (D.)

(3) See accordingly 4 *Leon.* 241. Conditions when they tend to defeat eſtates are *ſtricti juris*, *Lit. Rep.* 128. *Roll. Rep.* 70. Conditions in reſtraint of marriage are odious, and are therefore held to their utmoſt rigour and ſtrictneſs, *per Ld. Mansfield*, 4 *Burr.* 2055, *Long* v. *Dennis*.

therefore in that caſe albeit the words be not ſatisfied, yet * if the intent be ſatisfied, it ſufficeth (1). And therefore if one make a feoffment in fee, on condition that the feoffee ſhall make an eſtate back again in tail to the feoffor and his wife before ſuch a day, and before that day the feoffor die; in this caſe the condition ſhall be performed as near to the intent as may be; and therefore if the condition be, that he ſhall make the eſtate to them two *Habendum* to them and the heirs of their two bodies engendred, the remainder to the right heirs of the feoffor, the eſtate ſhall be made to the wife for life without impeachment of waſte, the remainder to the heirs of the body of the huſband begotten on the wife. And if *A.* enfeoff *B.* on condition that *B.* ſhall make an eſtate in frankmarriage to *C.* with ſuch a one the daughter of the feoffor; in this caſe albeit an eſtate in frankmarriage may not be made, yet an eſtate ſhall be made to them for their lives (2). *Et ſic de ſimilibus. Conditio beneficialis, quæ ſtatum conſtruit, benigne ſecundum verborum intentionem eſt interpretanda; odioſa autem, quæ ſtatum deſtruit, ſtricte ſecundum verborum proprietatem eſt accipienda.*

* P. 134.

To make an eſtate.

Co ſuper Lit. 209. 208. 219. Co. 2. 79. 6. 31 Lit. 353. Plow. 30. Perk. Sect. 155. 779. 794, 787. 793. 789. 788. 38 Ed. 3. 11. Dier 311.

In all caſes where a time is ſet, for the doing or performance of the matter contained in the condition, be it to pay money, make an eſtate, or the like, it muſt be done at the time agreed upon, and ſet down in the condition (3). And in caſes where it is to be done before a time certain, it muſt be done before that time, or elſe the condition is broken. But in all caſes where no time is ſet for the doing of the thing contained in the condition, be it to pay money, make an eſtate, or the like, if the act to be done, be to be done to the party that doth make the eſtate, or be to be done to him and a ſtranger, and be ſuch a thing as is for the benefit of him that doth make the eſtate, and for his benefit only, there regularly the party that is to do the thing ſhall have time to do it during his life, unleſs the party, feoffor, *&c.* that doth make the firſt eſtate, whereunto the condition is annexed, doth haſten the doing thereof by requeſt; for if he requeſt the doing thereof and ſet no time, it muſt be done within a convenient time after that requeſt; and if he requeſt and prefix a time convenient when he doth deſire to have it done, it muſt be done at that time; and in theſe caſes the condition cannot be broken without a requeſt, ſo long as he to whom the eſtate upon condition is made be living. And therefore in this caſe it is not like to a condition made by a will; for if one deviſe his land to *I. S.* ſo as he pay the twenty pounds to *I. D.* the teſtator doth owe him, and no time is ſet for the payment thereof; in this caſe he muſt pay it as ſoon as it is demanded, or he doth forfeit the land, and the heir may enter. But if the thing to be done, be to be done to a ſtranger, and be for the profit and benefit of a ſtranger only; as if a feoffment be made, on condition that the feoffee ſhall marry the daughter of the feoffor (4), or on condition that the feoffee

2. In reſpect of time.

To pay money.

Teſtament.

To marry *I. S.*

(1) See accordingly, 10 *Mod.* 420.

(2) See further how a condition ſhall be conſtrued, *Com. Dig.* Chancery (2 Q.) and by whom and to whom a condition is to be performed, *Bac. Abr.* Condition (P.) *Vin. Abr.* Condition (F. a.) (G. a.) *Com. Dig.* Condition (G.)

(3) If the condition be to pay money *at ſuch a day*, it is ſufficient if it be paid before the day, if the party accepts it, for that amounts to payment upon the day. *Co. Lit.* 212. b.

(4) And he doth not when thereunto required, but continues to hold the lands, this is a deforcement which ariſes upon a breach of the condition: See 3 *Bl. Com.* 173.

* ſhall

* P. 135.

To infeoff.

* ſhall infeoff a ſtranger, and no time is ſet for the doing hereof; in theſe caſes the feoffee ſhall not have time during his life to do it, but he muſt do it in a reaſonable time, and that without any requeſt at all, or elſe he doth break the condition (1). And in ſome ſpecial caſes when the act to be done is to be done to the party himſelf, the party ſhall not have time to do it during his life; as if one grant land to *I. S.* on condition that he ſhall grant an advowſon to the grantor for his life; or on condition that he ſhall grant a rent charge to the grantor during his life, to be paid at Michaelmas and Lady-day; in theſe caſes the grant of the advowſon muſt be before the advowſon fall, and the grant of the rent muſt be before either of the days of payment come, and that without requeſt, elſe the condition is broken (2). And if the condition be that if *I. S.* do ſuch an act, that then the feoffee ſhall pay ten pounds to the feoffor, elſe that the feoffor ſhall re-enter, and no time is ſet when the feoffee muſt pay this ten pounds; in this caſe it ſeems the payment muſt be as ſoon as the ſame act is done, and that without any requeſt at all. And in caſe where the feoffee, *&c.* or a ſtranger, be to do an act, and he alone is to do it, and it doth nothing concern the feoffor, *&c.* as to go to *Rome*, or the like, there the feoffee, *&c.* or ſtranger ſhall have time during his life to do the thing, and it cannot be haſtened by requeſt.

To grant an advowſon or a rent.

Perk. Sect. 9. 798.

To pay money.

Co. ſuper Lit. 209.

To make a leaſe.

If lands be granted, on condition that the grantee ſhall make a leaſe for life of other lands to the grantor, the remainder to a ſtranger; in this caſe the feoffee ſhall have all the time of his life to do it, if he be not haſtened by requeſt. But if the condition be to make a gift in tail to a ſtranger, the remainder to the feoffor; in this caſe it muſt be done in time convenient without requeſt.

Co. ſuper Lit. 220. 222.

If the King licence his tenant to infeoff *A.* and *B.* ſo as they give the land again to the feoffor, and the heirs males of his body, and he make a feoffment accordingly; in this caſe it muſt be reconveyed before the death of the feoffor, or elſe the condition is broken.

To infeoff

If *A.* infeoff *B.* of black acre, on condition that if *C.* infeoff *B.* of white acre *A.* ſhall re-enter; in this caſe *C.* ſhall have time to do this during his life, if *B.* do not haſten it by requeſt.

Co. ſuper Lit. 208.

To get the good will of *J. S.*

If a leſſee grant his eſtate to a ſtranger, on condition that the grantee do get the good will of the leſſor, and no time is ſet when he ſhall get his good will; it ſeems in this caſe he ſhall have time to get his good will during the term, and that although he deny it at the firſt, yet if he grant it afterwards that this is ſufficient.

Perk. Sect. 795.

When a time is ſet in certain for the payment of money, or the doing of any other thing generally, neither agent nor patient are bound to attend any other time. And if the thing be to be done on a day certain, but no hour of the day is ſet down wherein the * ſame ſhall be done; in this caſe they muſt

Lit. Sect. 342. Co. ſuper Lit. 213.

* P. 136.

(1) See accordingly *Bac. Abr.* Condition, *pl.* 26. and *pl.* 217.

(2) If a man grant an advowſon, upon condition that the grantee ſhall regrant the ſame to the grantor in tail, in this caſe if the church become void before the regrant, or before any requeſt made by the grantor, he may take advantage of the condition, becauſe the advowſon is not in the ſame plight it was at the time of the grant. *Co. Lit.* 222. b.

attend ſuch a diſtance of time before the ſun ſet, as may be convenient to do that work in. And if the condition be to pay money at a place certain, at any time during life; in this caſe the money may not be tendred at any time in the place, in the abſence of him that ſhould receive it; but he that is to pay it muſt give notice to the other party before hand, at what time he will tender it, that the other may be ready to receive it. Or if at any time the parties happen to meet at the place, a payment or tender then at that place is ſufficient (1). And the ſame law is for the moſt part in conditions of obligations (2). To pay money. Obligation.

Co. ſuper Lit. 210. 211. 213. Lit. Sect. 343. 345. Bro. Condition 60.

In caſes where a place is ſet down for the doing of the thing contained in the condition, there it muſt always be done at that place, unleſs by ſome agreement made between the parties afterwards another place be appointed; otherwiſe the condition is not performed, and the parties are not bound to attend in any other place (3). But in caſes where there is no place ſet down for the doing of the thing contained in the condition, if the thing to be done be a corporal ſervice, as to pay money, or any ſuch like thing, the party that is to do it muſt at his peril ſeek out the perſon to whom it is to be done, if he be *infra regnum Angliæ*; but if he be not within the kingdom, he is not bound to ſeek him, and yet the condition is not broken. And if the thing to be done be either local, *i. e.* ſuch a thing as muſt be done in or at a place certain, as the making of a feoffment of land, payment of rent, or the like; in this caſe the thing muſt be done at that very place, and a tender of doing it in that place is a ſufficient performance of the condition: as for example, if a feoffment be made, on condition that the feoffee ſhall pay to the feoffor twenty pounds on Eaſter-day at *Dale*, and the feoffee tender the twenty pounds the ſame day at *Sale*; and albeit the feoffor be at *Sale*, and he tender the twenty pounds to his perſon there the ſame day, yet this is no performance of the condition. And if a feoffment be made in mortgage, on condition for the payment of money at a day, and no place is ſet for the payment thereof; in this caſe the mortgagor muſt ſeek the mortgagee and tender it to his perſon at his peril; and tender of the money upon the land mortgaged, is not a ſufficient performance of the condition (4). And if a feoffment be made, on condition that the feoffee ſhall infeoff the feoffor of white acre in *Dale*; in this 3. In reſpect of places. To pay money. To infeoff

(1) See more fully as to the time of performance of a condition, *Vin. Abr.* Condition from (C. b.) to (M. b.) *Com. Dig.* Condition, (G. 3.) *Bac. Abr.* Condition (P. 3).

(2) See the chapter on obligations.

(3) Where a certain place is appointed for payment, the one party is not bound to pay nor the other to accept payment in any other place. 1 *Rol. Abr.* 444.

(4) The mortgagor in order to perform the condition, and make a ſufficient tender, muſt be attentive likewiſe to the time and manner of making his tender: as to the *time*, if the payment is mentioned to be made on the day indefinitely, any convenient time before the laſt inſtant of the day is the uttermoſt time appointed by law, *Co. Lit.* 202. a. See alſo *Com. Dig.* Condition (G. 8.) with reſpect to the *manner* of making a legal and ſufficient tender of the mortgage money, if the condition be (as it uſually is) to pay *lawful money of Great Britain*, that is to be underſtood money coined by the King's authority, or foreign coin by proclamation made current within the realm, *Co. Lit.* 207. a. 5 *Co.* 114. b. and though it may be very inconvenient to a mortgagor to procure the whole ſum in caſh, yet he is to conſider that Bank notes are not ſtrictly a legal tender, unleſs offered to be turned into money. *Eq. Ca. Abr.* Mortgages (D.) *pl.* 9. *Vin. Abr.* Tender (B.) The mortgagor may bring the money in purſes or bags, without ſhewing or telling it; it being incumbent on the mortgagee to put it out, and tell it. It alſo behoves the mortgagee to inſpect the goodneſs of the money; for if there is any bad money in the bags, and the mortgagee accepts it, the mortgagor is not bound to change it.—5 *Co.* 115. *Co. Lit.* 208. a.—See further in *Vin. Abr.* Tender (E).

caſe the feoffment, or the tender of it muſt be in *Dale*, and cannot be elſewhere, and a tender of it there is ſufficient to perform the condition. So if the condition be, that the feoffee ſhall in Eaſter Term next acknowledge ſatisfaction upon a judgment in the *King's Bench*; this muſt be done there, and cannot be done elſewhere. So if a feoffment in fee be made of white acre, rendring rent to the feoffor and his heirs, on condition that if the rent be not paid, the feoffment to be void, and * no place is ſet for the payment of it; in this caſe the feoffee is not bound to tender his rent any where for the ſaving of the condition, but upon the land, and a tender there is ſufficient. And if a man make a feoffment in fee, without any reſervation of rent precedent in the deed, on condition that the feoffee and his heirs ſhall render a yearly rent of twenty ſhillings a year to the feoffor and his heirs, and if they fail, that the feoffor ſhall re-enter; in this caſe alſo it ſeems the payment or tender muſt be upon the land. But if the condition be, that he ſhall render twenty ſhillings a year to a ſtranger, and his heirs; this is no rent, nor in the nature of a rent, and therefore in this caſe the feoffee muſt tender it to the perſon of the ſtranger where he can find him at the day, or elſe he doth break the condition, and tender upon the ground is not ſufficient. But in theſe caſes if the nature of the thing to be done be ſuch as will not admit of ſuch a carriage from place to place, to ſeek out the perſon of the feoffor, *&c.* there albeit the thing to be done be corporal or tranſient, and not a local thing, yet he that is to do it ſhall not be bound to ſeek out the perſon of the other; as for example, if an eſtate be made, on condition that the grantee ſhall deliver twenty quarters of wheat, or twenty loads of wood, to the grantor at ſuch a time, and no place is ſet for the doing thereof; in this caſe the grantee is not bound to carry the ſame about to ſeek the feoffor or grantor, as he is bound to carry money; but before the day, the grantee is to know of the grantor where he will appoint to receive it, and there it muſt be tendred. And the like law is for the moſt part in conditions of obligations.

To acknowledge ſatisfaction.

* P. 137.
To pay rent.

To deliver wood or corn.

Obligation.

A caveat.

It is beſt therefore in all theſe caſes, and herein he that is to be the agent is to take care to have certainty of time and place ſet down in the condition for the doing of the thing that is to be done, and the more certain it is, the better it is for him (1).

4. In reſpect of other matters.
To pay money.

If a leaſe be made, on condition that the leſſee ſhall pay to the leſſor all ſuch ſums of money as the leſſor ſhall lay out in ſuch a buſineſs; in this caſe, the leſſor muſt firſt tender to the leſſee a note of the charges, before the leſſee is bound to pay; and until this be done, the condition cannot be broken. And after a note is given alſo, he ſhall have ſome reaſonable time to provide the money. And if he tender him a note of more than in truth he doth lay out, the leſſee, if he know it, may pay ſo much as is laid out, and he may refuſe to pay any more. Per Juſt. Bridgman.

To make an eſtate.

If lands be granted, upon condition that *A.* ſhall make an eſtate of lands at the charges of *B.* in this caſe *A.* muſt do the firſt act, *viz.* notify to *B.* what aſſurance he will make, before *B.* is bound to tender the charges. Co. 5. 22.

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(1) See further as to the performance of a condition at a certain place, in *Bac. Abr.* Condition (P. 4.) *Vin. Abr.* Condition (U. b.) *Com. Dig.* Condition (G. 9.)

If

Paſche 17. Jac. B. R. If a feoffment be made, on condition that the feoffee ſhall give ſo much houſhold ſtuff to the feoffor, or ſo much money for it as it ſhall * be rated at by two indifferent perſons to this end to be choſen; it ſeems in this caſe, the election of the two men muſt be by the feoffee: but if the words be by two perſons to be indifferently choſen, then the election ſhall be by both parties, for in the firſt caſe the word indifferent doth go to the praiſing, not to the perſons. To deliver houſhold ſtuff, or pay money. * P. 138.

27 H. 8. 1. Plow. Colthirſt's caſe 21. If a feoffment be made of a ground, on condition that the feoffee ſhall rake the ditches; in this caſe if the feoffee do it once, it is a ſufficient performance of the condition. And yet if a man grant a houſe for life, on condition that the leſſee ſhall dwell and be reſident in the houſe during the ſaid term; in this caſe it is not ſufficient that he dwell in it once during the term, but muſt do ſo all the term, or elſe the condition is broken. To cleanſe ditches. To dwell in the houſe.

Perk. Sect. 804. If an annuity be granted of ten marks *per annum* to a man, on condition, or till he be promoted to a benefice by the grantor, and it is not ſaid of what value the benefice ſhall be; in this caſe it ſhall be taken for a benefice of as great value, and of as good an eſtate as the annuity is; otherwiſe the grantee may refuſe it, and yet his annuity ſhall continue. To give goods.

Perk. Sect. 742. If a feoffment be made, on condition that the feoffee ſhall give all his goods *ſi quæ fuerint*, or give all his pikes in his pond *ſi quæ fuerint*; in this caſe the words ſhall be taken in the preſent tenſe, for the goods and pikes that are at the time of the grant. But if a feoffment be on condition that the feoffee ſhall give all his goods in *London ſi quæ fuerint*, that did belong to *I. S.* in this caſe the words ſhall be taken in the preterperfect tenſe.

Haward & Fulcher's caſe. Hil. 3. Car. B. R. If one make a leaſe of the manor of *Dale* (wherein is a wood called *Dale-wood)* excepting all the woods, and underwoods, growing in *Dale-wood*, and all the great trees growing elſewhere, and this is upon condition, that if the leſſee ſhall diſturb the leſſor to cut and ſell the wood and underwood excepted, the leaſe to be void; in this caſe it ſeems the condition ſhall extend only to the wood and underwood in *Dale-wood*, and not to the trees elſewhere: but if the words of the condition be [ſhall diſturb, *&c.* to cut, *&c.* the wood and underwood on the premiſſes] *contra*. Not to diſturb the leſſor in taking the wood.

Dier 142. If one grant land rendring rent at the feaſts of *S. Michael* and *Lady-day* or within a month after, on condition that if it be behind after the feaſts and days limited by the ſpace of eight weeks, that the leaſe ſhall be void; in this caſe the eight weeks ſhall be accounted from the month which is the twenty eight day after the feaſt. To pay rent.

12 H. 7. 10. Co. ſuper Lit. 225. Perk. Sect. 746. Dier 337. 372. If the condition be made in the copulative and conſiſt of divers parts, every part muſt be obſerved, or the condition will not be performed (1). But when it is made in the disjunctive, if any part of it be obſerved it is a ſufficient performance of the condition. And therefore if a feoffment be made, on condition to reinfeoff and pay * twenty pounds, and the feoffee do reinfeoff but not pay the twenty pounds; in this caſe the * P. 139.

(1) But if ſuch condition copulative is impoſſible to be performed, it ſhall be taken in the disjunctive. *Owen* 52. As where the condition is, *that he and his executors* ſhall do ſuch a thing, this is in the disjunctive, becauſe he cannot have an executor in his life time. *Roll. Abr.* 444. ante 115.

condition is broken. But if the condition be to reinfeoff or pay twenty pounds, and the feoffee do one of them; it is a good performance of the condition (1). And when it is made in the copulative and disjunctive both, it ſhall be taken in the disjunctive only; as, if a leaſe for years be made to *A.* and *B.* his wife, on condition that the ſaid *A.* and *B.* or any child between them ſhall ſo long live; this ſhall be taken in this ſenſe if the huſband, wife, or child ſhall ſo long live; ſo that the leaſe ſhall not be determined by the death of the huſband or wife alone (2). If there be two proviſoes in two ſeveral indentures of conveyance of ſeveral manors to *A.* and *B.* that if the feoffor pay or tender twenty ſhillings to *A.* and *B.* or the heirs of *A.* that the conveyance ſhall be void, and *A.* die; in this caſe tender to *B.* is not ſufficient, and it muſt be made to the heir of *A.* and it muſt be twenty ſhillings for every proviſo: but otherwiſe it is of a collateral act.

If the words of a condition be thus, that upon ſuch a contingent the party ſhall enter and retain the land until the thing be done, *&c.* in this caſe, and by theſe words, the eſtate is not determined; as it is by theſe words, [that the eſtate ſhall be void, or that the grantor ſhall re-enter, or the like]. And in theſe words there is a difference alſo to be obſerved; for if the words be, that upon ſuch a contingent the eſtate ſhall ceaſe and be void, and it be a leaſe for years to which the condition is annexed, the eſtate is *ipſo facto* void without entry, or claim, and can never be affirmed afterwards; but if the words of the cloſe of the condition be, that the feoffor, leſſor, *&c.* ſhall re-enter, without any other words, albeit it be in a leaſe for years, yet the leaſe is not void until he hath made an actual re-entry. But in both caſes if the eſtate to be avoided be an eſtate in fee, or for life, it is only voidable by the breach of the condition, and muſt be made void by entry, or claim; and until this be done, the grantor can make no new eſtate of the land. But in the firſt caſe before, the party ſhall retain the land and take the profits of it in the nature of a pledge, until the thing be done agreed upon in the condition, and then the other party ſhall have the land again. See more in the next queſtions. And in *obligation numb.* 7. *covenant numb.* 6.

Co. 3. 64. ſuper Lit. 203, 204 Dier 6. 127. 11 H. 7. 21.

9. When and how a condition or limitation ſhall be ſaid to be performed; or not.

1. When the act is to be done between the parties themſelves.

To make an eſtate.

The words of a condition may be performed, and not the intent; and the intent may be performed, and not the words; and then for the moſt part a condition is performed when the intent and meaning of it is obſerved. And therefore if a feoffment be made, on condition that the feoffee or his heirs ſhall make an eſtate to the feoffor and his wife in tail before ſuch a day, and before the day the huſband die, and then he make an eſtate as near it as he may, *viz.* to the wife for life without impeachment of waſte, and after to the heirs of the body of the huſband; this is a good * performance of the condition. And if the condition be that the grantee ſhall make a feoffment of land; and he make a leaſe of the land firſt, and

Co. 8. 90. Lit Sect. 352. Co. 3. 64. 282. 2 H. 4. 11.

Co. ſuper Lit. 207.

* P. 140.

(1) If *A.* obliges himſelf to pay to *B.* ten pounds, *or* ſo much as *J. S.* ſhall appoint, if *J. S* will not appoint any ſum to be paid, *A.* ſhall pay the ten pounds, *Lutw.* 694. What ſhall be deemed a condition disjunctive, how it ſhall be performed, and when the performance ſhall be excuſed, ſee in *Com. Dig.* Condition (K.)

(2) See accordingly the caſe of *Baldwin* and *Cocks*, 1 *Leon* 74. *Owen* 52. S. C.

then

then a releaſe to the leſſee and his heirs; this is *tantamount* and a good performance of the condition (1).

Co. ſuper Lit. 222. Perk. Sect. 802, 803.

If a feoffment be made, on condition that if the feoffor or his heirs pay ten pounds by a day, the feoffment to be void, and the feoffor before the day doth commit treaſon and is executed, and ſo dieth without heir; and after, before the day, the heir is reſtored, and he at the day doth pay the money; in this caſe this is a good performance, notwithſtanding there was once a diſability. So as if heretofore one had made a feoffment, on condition to reinfeoff by a day, and before the day the feoffee had entred into religion, and then had been dearraigned, and at the day had made the feoffment; this had been a good performance of the condition.

To pay money.

Co. 5. 96. & ſuper Lit. 208. 207.

If a feoffment be made, upon condition that if the feoffee ſhall pay to the feoffor ten pounds ſuch a day, that then he ſhall have the land to him and his heirs, otherwiſe that the feoffor ſhall re-enter; or if it be made on condition that the feoffee ſhall pay ten pounds to the feoffor ſuch a day; and before the day the feoffee ſell the land; in this caſe the ſeller, or the buyer either of them may tender the money at the day, and this will be a good performance of the condition; for he that hath intereſt in the land on the one ſide, or in the condition as party or privy on the other ſide, may tender and perform the condition to ſave the eſtate.

By and to whom money ſhall be paid upon a condition.

Lit. Sect. 534. 537. 15 H. 7. 2. Co. ſuper Lit. 206.

If lands be mortgaged, or (which is all one) if a feoffment be made of lands on condition that if the mortgagor or feoffor pay ten pounds to the feoffee ſuch a day, that then the eſtate ſhall be void, and before the day the mortgagor or feoffor die; in this caſe the heir or executor of the feoffor, the ordinary, the gardian in chivalry or ſocage of the heir of the feoffor, or any other by either of their commandment precedent, or aſſent ſubſequent, may pay this money at the day, and payment or tender of it by either of them at the day is a good performance of the condition (2).

† Lit. Sect. 125.

† And ſo alſo it ſeems is the law upon Teſtament.

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(1) If a man is bound in an obligation upon condition to infeoff *J. S.* and he makes a leaſe for years and releaſe to him in fee; he has performed the condition, although he has not performed the words. *Plow.* 7. It is well performed, becauſe this in law amounts to a releaſe. *Br. Abr.* Condition *pl.* 158.

(2) Becauſe they repreſent the perſon of their teſtator, *&c.* and have an intereſt in the land; and the feoffee has the ſame advantage if the payment be made by the heir, *&c.* as if it were by the feoffor himſelf, *Co. Lit.* 209. but if the money is not paid at the day, whereby the condition is loſt, and the eſtate of the mortagee becomes abſolute at *law*, the mortgagor is allowed in *equity* to redeem, on payment of the money due; and this is called his *equity of redemption*. The doctrine of redemption of eſtates in mortgage is very intereſting, and very extenſive. The reader will find a full explanation of the nature of it, what perſons are intitled to it, after what length of time, and in what manner, in *Bac. Abr. tit.* Mortgage (E.) *Com. Dig.* Chancery (4 A. 4.) *Vin. Abr.* Mortgage (Q.) The mortgagor upon non-payment according to the condition, became irrelevant, except in a court of equity, until the ſtatute of 7 *Geo.* 2. *c.* 20. That act recites, that in ejectments by mortgagees for the recovery of the mortgage lands and in actions on the bonds given by the mortgagors to pay the money, *courts of law have not power to compel mortgagees to accept the principal and intereſt due to them and coſts*, or *to ſtay mortgagees from proceeding to judgment in ſuch actions, but mortgagors muſt have recourſe to a court of equity*, in which caſe courts of equity do not relieve till the hearing of the cauſe: For remedy thereof it is enacted, that in action on bond for payment of mortgage money, or in ejectments in any of the courts at *Weſtminſter*, at ſeſſions in *Wales*, or in the counties palatine of *Cheſter*, *Lancaſter*, or *Durham*, for the recovery of mortgaged lands, when there is no ſuit depending in equity for foreclоſing thereof, If the perſon having right to redeem, and who ſhall become defendant in ſuch action, ſhall, at any time pending ſuch action, pay ſuch mortgagee, or, in caſe of his refuſal, bring into court, all principal and intereſt due on the mortgage, and all coſts, the monies paid to ſuch mortgagee, or brought into court, ſhall be in full diſcharge of the mortgage, and the court may compell ſuch mortgagee to re-convey the mortgage lands, and deliver up all deeds relating to the title thereof. And it alſo enacts that in all ſuits in equity for foreclоſure, *courts of equity*, upon application made by the defendant having a right to redeem, and upon admiting plaintiffs right, may at any time before the cauſe be brought to hearing, make ſuch decree therein, as they could have made in caſe ſuch cauſe had been regularly brought to hearing.

a deviſe of land to *I. S.* paying to *I. D.* twenty pounds; if *I. S.* die, his heir or executor may pay the twenty pounds, and this is a good performance of the condition. But in theſe caſes, if a ſtranger, of his own head without any ſuch commandment or agreement, pay the ten pounds; this will be no good performance of the condition. And yet perhaps if the party that is to pay it be an ideot; the payment or tender by any one in his behalf ſhall be a good performance of the condition (1). And if a feoffment be made, on condition that if the feoffor pay ten pounds to the feoffee, that the eſtate ſhall be void, and no time is ſet for the payment of this money, and the feoffor die before any payment or tender made; in this caſe his heir cannot tender it and ſo perform the condition. Lit. Sect. 337.

* P. 141. * If a feoffment be made, on condition that if the feoffor and *I. S.* pay ten pounds ſuch a day, the feoffment to be void, and the feoffor die before the day, and *I. S.* alone pay it; this is a good performance of the condition. Co. ſuper Lit. 207. Bro. Condition 109.

If a feoffment be made, on condition that the feoffor pay to the feoffee or his heirs ten pounds ſuch a day, and before the day, the feoffee doth grant the land away to another; in this caſe the money may be paid to the feoffee himſelf, or if he be dead to his heirs, and this payment is a good performance of the condition (2). And if the words of the condition be [that if he pay to the feoffee, his heirs or aſſigns, *&c.*] in this caſe, payment to either of them, is a good performance of the condition; ſo as if in this caſe the feoffee make a feoffment over, it is in the election of the firſt feoffor to pay the money to the firſt or ſecond feoffee, and if the firſt feoffee die, to pay it to his heir or the ſecond feoffee. But payment to an executor or adminiſtrator in this caſe is not a good performance. And yet if the words of the condition be, that if he pay to the feoffee [without the words, heirs, executors, *&c.*] ten pounds ſuch a day, in this caſe the payment may be made to the executor or adminiſtrator of the feoffee after his death, and ſuch a payment is a ſufficient performance of the condition: and if the words of the condition be [that if the feoffor pay to the feoffee, his heirs, executors or adminiſtrators, *&c.* in this caſe payment to either of them, is a good performance of the condition. But payment to an aſſignee in this caſe is not good (3). And if the words be, that if he pay to the feoffee and his heirs, *&c.* in this caſe payment to his executors, or to his aſſigns is not a good performance of the condition. So that in all theſe caſes, it ſeems that, as to the perſon to whom payment is to be made, the words of the condition are preciſely to be purſued. Co. ſuper Lit. 210. 5. 96. Dier 181. 101. Co. 6. 69. Lit. Sect. 339.

To tender money. If a feoffment be made, on condition that if the feoffor ſhall tender twelve pence to the feoffee ſuch a day, the feoffment to be void, and afterwards the feoffee is diſſeiſed of the land, and after the feoffor doth tender the twelve pence to the Paſ. 9 Jac. 5. Sir Richard Lee's caſe.

(1) If the heir be an Idiot of what age ſoever, any man may make the tender for him in reſpect of his abſolute diſability; and the law in this caſe is grounded upon charity, and ſo in like caſes. *Co. Lit.* 206. a. *Vin. Abr.* Condition (K. a.) *pl.* 10.

(2) And in ſuch caſe the money ſhall not be paid to the executors. 5 *Co.* 96. b.

(3) If the words of the condition are, to pay the *feoffee*, his executors, or aſſigns, and the feoffee make his ſons his executors, and dies, and adminiſtration is committed during their minority, the ſafeſt way is to pay the money to the executors or one of them, the adminiſtrator being but a bailiff to them. 3 *Leon.* 103.

feoffee

feoffee at the day; this is a good performance of the condition.

Dier 69. 41 E. 3. 25. If a feoffment be made to two men, on condition that they shall reinfeoff the feoffor, or make a leaſe to him by a day, and before the day one of them die, and the ſurvivor doth reinfeoff, or make the leaſe; this is a good performance of the condition. And ſo alſo it ſeems the law is, if both the feoffees be living, for by his own acceptance it ſeems he hath diſpenſed with the condition, and ſo cannot enter for the breach of it. To reinfeoff.

Plow. 23. 3 H. 7. 4. 21 H. 6. 101. If a feoffment be made on condition, that the feoffee ſhall infeoff the feoffor of the manor of *Dale* by ſuch a time, and before the time appointed the feoffee doth grant a rent-charge out of the manor to a ſtranger, and then at the time appointed makes a * feoffment of the manor according to the condition; in this caſe, this is a good performance of the condition. But if in this caſe the feoffee before the time appointed grant away to a ſtranger twenty acres parcel of the manor, and then doth make a feoffment of the manor according to the condition; this is no good performance of the condition. And if a feoffment be made on condition that the feoffees or leſſees, in truſt, of ſuch land ſhall grant an annuity out of it, and ſome of them only do grant this annuity; this is no good performance of the condition. * P. 142.

44 E. 3. 22. If there be a feoffment made, upon condition that the feoffee ſhall make a leaſe of land to the feoffor for life, the remainder to *I. S.* in fee, and the feoffee make a leaſe to the feoffor for life, and after by another deed doth grant the reverſion to *I. S.* this is a good performance of the condition. To make a leaſe.

Perk. Sect. 807, 808. 21 H. 6. 28. Dier 15. If a feoffment be made, upon condition that the feoffee ſhall purchaſe lands or tenements to the value of twenty pounds *per annum*, and he purchaſe a rent, common, or any ſuch like thing, to that value; this is a good performance of the condition. But if in this caſe the feoffee and another purchaſe ſo much land together jointly; this is no good performance of the condition. So if the feoffee alone purchaſe lands to the value of twenty pounds *per annum*, and there is a rent iſſuing out of it which muſt be deducted; this is no good performance. And yet in theſe caſes, if the ſtranger joint-tenant releaſe to the feoffee all his right in the land, or the grantee of the rent releaſe to him the rent before the time of the performing of the condition, the condition is well performed in both caſes. To purchaſe lands.

Perk. Sect. 812. *Tantum valet terra quantum vendi poteſt.* And if one make a feoffment in fee, on condition that if the feoffee purchaſe land to the value of twenty ſhillings, the feoffment ſhall be void, and after the feoffee diſſeiſe another man of land to that value; it is ſaid that by this the condition is performed; *Sed quere.* And if he recover ſo much land in value in an action; that this is no performance of the condition: *Sed quere.* For this ſeems to me a better performance of the condition than the former. Payment.

Dier 181. Lit. Sect. 334, 335. 338. Co. ſuper Lit. 209. If lands be granted, on condition to pay money, and the money is tendred according to the condition, but either no body is ready to receive it, or it is refuſed; this is a good performance of the condition. And after a man hath once refuſed the money ſo tendred to him according to the condition, he hath no remedy in law to recover it, except it be money lent upon To pay money. tender.

upon a mortgage. [a] And if the payment be made part of it with counterfeit coin, and the party accept it and put it up; this is a good payment and consequently a good performance of the condition. [b] And if at the day of payment the parties do account together, and he to whom the money is to be paid being indebted to the other, that debt by * agreement is allowed, and the residue is paid and accepted; this is a good performance of the condition. [c] So if the party that is to receive it, accept and take new security by bond or statute for the money; this is a good performance of the condition. [d] And so in most cases, when by a condition a thing is to be done one way, and to be done to the party to the condition himself, and not to a stranger, and he doth accept it another way; this is a good performance of the condition (1). *Volenti non fit injuria.* But if the thing to be done, be to be done to a stranger, and one that is no party to the condition, and it be done in any other manner, and he accept thereof; this is no performance of the condition. And so also if the time of doing the thing be past, as if one make a feoffment to me, on condition that if he pay me ten pounds, such a day, the feoffment shall be void, and he doth not pay me at the day, but doth die, and after by agreement between his heir and me, he doth pay me the ten pounds, and I receive and accept it, and thereupon I suffer him to enter and hold the land; in this case the condition is not performed, but I may enter upon him and oust him notwithstanding.

Acceptance.
* P. 143.

a Terms of the law. tit. coin.

b Co. super Lit. 212. Fitz. Barre 343.

c Co. super Lit. 212.

d Dier 45. Co. 5. 96.

Perk. Sect. 392.

If the mortgagor pay the money according to the condition, and after the mortgagee deliver it to the mortgagor as his own money, the condition is performed, and the mortgage discharged notwithstanding.

Adjudged Mich. 40. & 41 Eliz. BR. Powel. versus Bartholomew.

If a feoffment be made to *I. S.* on condition that if the feoffor pay to the executors or administrators of *I. S.* ten pounds the feoffment shall be void, and *I. S.* die, and the ten pounds are paid to the executors of *I. S.* according to the condition, but it is covinously done, *i. e.* there is a private agreement, that the feoffor shall have all, or part of his money again; this payment in this case, is no good performance of the condition: but that payment that must be a performance of a condition in this case to fetch lands out of the hands of an heir, must be real, full and effectual.

Co. 5. 96. super Lit. 209.

To get the good will of *I. S.*

If a lease be made, on condition that the lessee shall get the good will of *I. S.* and the lessor doth come to *I. S.* first, and ask his good will, and he deny it him, and after when the lessee doth ask it, he doth grant it him; in this case the condition is performed. So if the condition be, that he shall get his good will by such a day, and at the first being desired he denied it, but afterwards and before the day he doth grant it. And yet if no day be set, and he desire his good will and *I. S.* denieth it and afterwards, he doth get his good will; it seems this is no performance of the condition.

14 H. 8. 17.

If there be two things in the copulative to be done by the condition, both must be done, otherwise the condition will not be performed.

Perk. Sect. 746. See before.

(1) See accordingly *Goodale* v. *Wyet*, *Cro. Eliz.* 283. *Moor* 708.

Co. ſuper Lit. 219.

If a feoffment be made, on condition that if the feoffor and *I. S.* * pay ten pounds at Michaelmas, the feoffment ſhall be void, and before the day the feoffor die, and *I. S.* pay the money; this is a good performance of the condition. But if the feoffor be living *contra*.

* P. 144.

2. When the act is to be done by a ſtranger. To pay money.

Plow. 133. Co. 3. 64.

If a feoffment be made, on condition to make an eſtate to a ſtranger by a day, and before the day he die; in this caſe if an eſtate be made as near the condition as may be, it is ſufficient.

3. When the act is to be done to a ſtranger. To make an eſtate.

Co. ſuper Lit. 209. 19 H. 6. 67. Perk. Sect. 815, 816. 2 E. 4. 2. 19 H. 6. 67.

† If a feoffment be made to *I. S.* on condition that he ſhall infeoff *I. D.* and his heirs; and *I. S.* doth tender the feoffment to *I. D.* and he doth refuſe to take it; this is no performance of the condition in this caſe. But if it be to be done to the feoffor himſelf, *contra*. And ſo alſo it is, if the condition be to make an eſtate tail, or any leſſer eſtate to a ſtranger, and he tender it, and the ſtranger refuſe it; this is no good performance of the condition. And if a feoffment be made, on condition to reinfeoff the feoffor and his wife in tail, the remainder to *W.* in fee, and he tender it to the wife only, and not to him in remainder; this is no good performance of the condition (1).

† Tender.

And the ſame law for the moſt part is in conditions of obligations. See more in *obligations* at *numb.* 9.

Co. ſuper Lit. 222. Dier 45, 46.

If a feoffment be made, on condition that the feoffee ſhall not infeoff *I. S.* of the land, and the feoffee doth make a feoffment to *I. S.* and *I. D*; this is a breach of the condition. And ſo alſo it is if the feoffee make a feoffment to *I. D.* to the intent that he ſhall alien to *I. S. Quando aliquid prohibetur fieri directo prohibetur & per obliquum.* And yet if the feoffee in the caſe before alien to *I. D.* and after he doth alien to *I. S.* this is no breach of the condition. And if the condition be, that the feoffee ſhall not infeoff *I. S.* and he die, and his heir enfeoff *I. S.* this is no breach of the condition.

10. What act ſhall be a breach of a Condition in deed: and when a condition in deed ſhall be ſaid to be broken, or not. Not to alien.

Dier 45. 65.

If a leaſe for years be made, on condition that the leſſee ſhall not aſſign, or alien, the term, or the land, during his life, without the licence of the leſſor, and the leſſee doth give it by his will without licence; this is a breach of the condition and forfeiture of the eſtate. But if he make an executor of his will only, this is no breach. And if the condition be that the leſſee ſhall not alien, and he die, and his executor alien, this is no breach of the condition. And if the condition be that the leſſee ſhall not alien but to his children, and the leſſee by will deviſe it to his executors; it ſeems this is a breach of the condition. So if he deviſe that *A.* his ſon ſhall have his term after his wife, and doth make *A.* his ſon his executor; it ſeems this is a breach of the condition. But if he do not make *A.* his executor *contra*. And in caſes of deviſe, albeit the executors do not aſſent, yet the condition is broken, as in caſe where a reverſion is granted on condition that the grantee ſhall not alien it, and he doth alien it, but no atturnment is to this grant; yet it ſeems this * is a breach of the condition. And if a leaſe for years be made, on condition that the leſſee or his aſſigns ſhall not alien, and the leſſee doth make his wife his executrix, and ſhe doth take another huſband, and he

Per 3 Juſtices B. R. 3 Jac.

Dier 6.

* P. 145.

(1) See more amply by whom, and to whom, a condition is to be performed, in the references in note 2 to page 131. See further *Marks* v. *Marks*, *Str.* 129. *Vin. Abr.* Conditions (K. a.) (L. a.)

doth alien it; it ſeems this is a breach of the condition, and a forfeiture of the eſtate. But if a leaſe be made on condition that the leſſee ſhall not alien without the licence of the leſſor, and after the leſſor die, and the leſſee aſſign, or the leſſee die, and his executors, or adminiſtrators, aſſign; this is no breach of the condition in either of theſe caſes (1). So if a leaſe be made, on condition that the leſſee ſhall not alien the term during his life, and he makes an executor, but doth not deviſe it to him; this is no breach of the condition. And Dier 152. Co. 4. 120.
if a leaſe be made, on condition that the leſſee his executors or aſſigns ſhall not alien the term to any perſons without the licence of the leſſor, but to the wife, or one of the children, of the leſſee, and the leſſee die, and his executors alien to one of the children of the leſſee, and he alien to a ſtranger without licence; this is no breach of the condition (2). And if one Hil. 38. El. Marſh v. Curtis.
make a leaſe of a houſe and land, on condition that the leſſee ſhall not parcel out the land or any part of it from the houſe, and the leſſee doth grant all his term in the houſe and part of the land, and doth keep the reſt, and after doth leaſe that part alſo; this is a breach of the condition.

Not to ſuffer a woman with child in the houſe.

If a leaſe be made of a houſe, on condition that the leſſee Co. 8. 92.
ſhall not ſuffer any woman great with child to harbour or lodge in the houſe ſix days after notice given by the leſſor, and the leſſee do ſuffer any ſuch perſon after notice given, albeit the leſſor conſent to it; yet the condition is broken. But if the leſſor do *nolens volens* keep ſuch a woman there againſt the mind of the leſſee; this is no breach of the condition.

Not to do waſte.

If a leaſe be made, on condition that if any waſte be done, 12 H. 4. 5. Bro. Condition 40.
the leſſor ſhall re-enter; in this caſe if the houſe fall by a tempeſt, this is no breach of the condition, for this is not waſte; but if it be uncovered by tempeſt, and the tenant hath a convenient time to repair it, and doth not, but doth ſuffer the timber to periſh for want of covering; this is a breach of the condition, and the leſſor may enter and put out the leſſee. † And † Per Dier and Walſh Juſtices. Dier 281.
if a leaſe be made, on condition that the leſſee ſhall not do waſte, and he ſuffer waſte to be made in decay of the houſes, *&c.* it ſeems the condition is broken. *Sed quere* (3).

Not to ſell it to any other till the leſſor refuſe it.

If a leaſe be made, on condition that if the leſſee be Dier 13.
minded to ſell his eſtate the leſſor ſhall have the firſt offer thereof, giving as much as another will give; in this caſe if the leſſee doth not give notice when he is minded to ſell it, he doth break the condition; but if when he is minded to ſell, he doth tell the leſſor of * his purpoſe, and what he is offered for it, and the leſſor doth either ſay he will not have it, or that he will not give ſo much for it, or doth not accept it, but doth delay, *&c.* and then the leſſee doth ſell it to another; this is no breach of the condition, neither is he bound to wait upon him in this caſe.

* P. 146.

Co. ſuper Lit. 221. 222. Co. 2. 58. Perk. Sect. 802. 803. Lit. Sect. 355. Co. ſuper Lit. 206.

To make an eſtate.

If a feoffment be made, on condition that the feoffee ſhall make a feoffment in fee, gift in tail, leaſe for life, or years,

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(1) And if the condition be not to alien the land, nor any part thereof, and the leſſee aliens part with the leſſor's aſſent, he may afterwards alien the reſidue without his aſſent; the whole condition being gone, for it cannot be divided, *Roll. Abr.* 471. See further *Com. Dig.* Condition (Q).

(2) In *Dyer.* 152. a. *Brooke*, *Brown*, and *Dyer* held that by the grant to one of the ſons, the reſtraint was not determined, and that the ſon could not grant over to a ſtranger without licence, but *Stamford* and *Catline*, *contra*. See further the caſe of *Thornhill and Adams* v. *King and wife*, *Cro. Eliz.* 757.

(3) See ante page 122, and note 3. thereto.

of the land, to the feoffor, or to a ſtranger by a day; and before the day the feoffee doth diſable himſelf to do it, either by making ſome eſtate of the ſame thing to ſome other perſon in tail, for life, years, in preſent or future, or for one year, or by taking a wife whereby ſhe may be intitled to dower, or by ſuffering a recovery of the land, or by granting of any rent, common, or the like, or by entring into any ſtatute, *&c.* or by ſuffering any judgment to be had againſt him, or by doing any other ſuch like act, whereby he cannot convey the land according to the condition in the ſame plight, quality, and freedom it was in at the time of the conveyance made; in either of theſe caſes the condition is *ipſo facto* broken. And albeit the land be afterwards diſcharged, and the party again enabled before the day to perform the condition, yet this will not ſalve the breach. And ſo alſo it is of a limitation. But when the condition is to be performed on the part of the feoffor or grantor, there diſability before the time will not hurt, ſo as he be again enabled at the time. And ſo alſo it is when the condition is to be performed on the part of the feoffee, and there is no certain day ſet for the performance of the thing, for in this caſe albeit he be once diſabled, yet if he be afterwards again enabled, and do it within the time that the law doth give him to do it; in this caſe the condition is not broken. And ſo alſo it is, if the feoffee be diſſeiſed, and, during the diſſeiſin, he do any ſuch act as before; in this caſe before his entry this is no breach of the condition, for till then the charge doth not bind the land. And ſo likewiſe it is when the diſability doth proceed from another cauſe, as where one doth make a feoffment, on condition that the feoffee ſhall reinfeoff before ſuch a day, and before the day the feoffor diſſeiſe the feoffee, and keep him out till the day be paſt; or one doth make a feoffment, on condition the feoffee ſhall marry *B.* before ſuch a day, and before the day the feoffor himſelf doth marry her, ſo that the feoffee cannot perform the condition; in theſe caſes the condition is not broken.

To employ the profits to charitable uſes.

Trin. 13 Jac. Slade v. Tompſon, B. R.

If one make an eſtate of lands (held in capite) on condition that he to whom it is made, ſhall imploy the profits thereof to divers charitable uſes, and he die, his heir within age, by reaſon whereof the King hath the land during the minority of the * heir, ſo that the profits cannot be employed; this is no breach of the condition.

* P. 147.

To reinfeoff.

Co. 1. in Porter's caſe.

If one make a feoffment of land, on condition to reinfeoff in convenient time, and the feoffee doth not ſo, but doth make a leaſe to another; this is a double breach of the condition. And the ſame law is of a deviſe by will in this manner.

To make an eſtate.

Perk. Sect. 796. Co. 8. 90. See the parable Mat. 21, 28.

If a feoffment be made, upon condition that the feoffee ſhall make ſome eſtate to the feoffor, or ſome other, by a day, and the feoffee before the day, ſay to him to whom the eſtate is to be made, that he will never make the eſtate, and notwithſtanding he doth make the eſtate before the day according to the condition; in this caſe it is ſaid the condition is broken. *Sed quere* of this, for it ſeems if he really deny it before, and actually perform it at the day; that this is a good performance of the condition. As if a leaſe be made of a houſe, on condition that the leſſee ſhall not diſturb the leſſor in the taking away of his goods,

To ſuffer one to take his goods.

goods out of the houſe, and when the party doth come or ſend to fetch them, the leſſee doth only forbid them; this in this caſe is no breach of the condition, and it was agreed in this caſe that words without ſome deed, as ſhutting the door againſt them, forcible reſiſtance, or laying of hands upon them, or the like, are no breach of ſuch a condition. And if a leaſe 3 H. 4. 8.

To ſuffer one to come into a houſe.

be made, on condition that the leſſor ſhall be four times a year in the houſe demiſed, without being ouſted by the leſſee, and the leſſee, ſeeing him coming, doth ſhut the door or windows againſt him; this hath been thought to be no breach of this condition.

To pay a yearly rent or ſum.

If a leaſe be made, on condition that the leſſee ſhall pay Dier 33. yearly to the leſſor during the term ten pounds; in this caſe if he fail of payment once, the condition is broken, and eſtate forfeit. So if one make a feoffment in fee of land, on condition to pay ten pounds yearly to *I. S.* if he fail once the condition is broken.

Not to moleſt copyholders.

If a leaſe be made of a manor in which are divers copyholders, on condition that the leſſee ſhall not moleſt, vex, or put out any copyholder paying his duties and ſervices, in this caſe if the leſſee enter upon, and put out any one copyholder, this is a breach of the condition. But if he enter *vi & armis* upon a copyholders tenements, and there beat him only, or the like; this is no breach of the condition. Penner verſus Glover 37 & 38 El. Mic. B. R. per curiam.

To pay rent.

If there be a condition to pay rent, and the leſſee let part Crompt. Juſ. of the land to other undertenants, or let all the land to another for part of the time, and he undertake the rent ſtill, and fail of payment; in this caſe the condition is broken, and the eſtate forfeit. But if there be any covin and practice in the caſe, between the firſt leſſor, and the leſſee, the undertenants may perhaps have relief in equity (1).

Equity.

Not to diſturb.

If one make a leaſe for years of land, and then alſo make Co. 8. 90. a feoffment in fee of the lands, on condition that if the leſſee be * diſturbed in his term that he ſhall have the fee ſimple, and he is diſturbed by the feoffor or by his means; in this caſe the condition is broken, and the leſſee ſhall have the fee ſimple. But if the diſturbance be by a ſtranger, and not by the feoffor, or by his means, or conſent; this is no breach of the condition.

* P. 148.

Not to be outlawed.

If a leaſe be made, on condition that the leſſee ſhall not be Per 2 Juſtices. H. 7 Jac. outlawed, and he is outlawed without proclamation; it ſeems B. R. this is no breach of the condition, becauſe the outlawry is not good.

If a condition poſſible at the time of creation, become after Lit. Sect. impoſſible in part by the act of God, and the party do not 352. perform that which is poſſible, the condition is broken (2). Co. 2. 59.

If a man make a leaſe for years on condition, and the leſſee Co. 8. 92. doth not know of it, and after the leſſor doth by will give the land to the leſſee without condition, and the leſſee doth ſuch

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(1) Covins, frauds, and deceits, for which there is no remedy by the ordinary courſe of law, are properly cognizable in equity; and matters of fraud were one of the chief branches to which the juriſdiction of chancery was originally confined. 4 *Inſt.* 84.—*Bac. Abr.* Fraud (B). Equity will give relief, tho' it is agreed that no relief ſhall be prayed in equity. 1 *Mod.* 305.—See fully in what caſes relief may be had in equity. *Com. Dig.* Chancery (3 F.) *Vin. Abr.* Chancery (N.) 2 *Atk.* 306. 1 *Vez.* 95. 126. 387.

(2) See Ante 130. note 2.

an act as is a breach of the condition; in this caſe the condition is not broken, for the leſſee muſt have notice of the condition ere he can break it.

Doct. & Stud. 35. 13 H. 4. 17. If a leaſe be made rendering rent, on condition, that if the rent be not paid within twenty days the leſſor ſhall re-enter, and the rent is not paid; in this caſe the condition is broken, but the leſſor cannot enter until he hath made a legal demand, and if he die before he do it, his heir ſhall never take advantage of that breach, but it is diſcharged for ever (1). To pay rent.

Lit. Sect. 353. Plow. 30. When an act is to be done in time convenient, or otherwiſe, and the party do it not by the time appointed by law; the condition is broken.

21 Ed. 3. 7. 8 H. 6 24. Dier. 369. If one grant an annuity *pro conſilio impenſo & impendendo*, and the grantor require adviſe, and the grantee refuſe or neglect to give it; this is a breach of the condition, and a forfeiture of the eſtate. And if the deed be, that he ſhall go to ſuch a place to give counſel, and he require him to go thither, and he refuſe it, this is a forfeiture of the eſtate. But if he refuſe to go with him to another place, or give counſel to his adverſary, being not required to give counſel to him, this is no breach of the condition nor forfeiture of his annuity. And if one had heretofore deviſed his land to be ſold by his executors, and to have been diſtributed for his ſoul, and the executors had not ſold it in time convenient, or had taken the profits to their own uſe; this had been a breach of the condition (2). See more in the laſt foregoing diviſion, and in *obligation numb.* 10. *covenant numb.* 7. The ſame law is for the moſt part of conditions of obligations. See *obligation numb.* 10. To give advice.

Lit Sect. 383.

Co. 2. 15. 8. 44. ſuper Lit. 233. Every particular eſtate hath a condition in law annexed to it: and therefore if tenant for life in dower, by the courteſy, or in tail after poſſibility of iſſue extinct, leſſee for years, tenant by ſtatute merchant, elegit, or the like, make any abſolute or conditional eſtate of the lands they hold, in fee ſimple, fee tail, or for life, and give livery of ſeiſin thereupon, or levy a fine *Sur conuſance de droit*, or ſuffer a recovery of the land, * or the like; this is a breach of the condition in law and a forfeiture of their eſtate (3). Alſo if any ſuch tenant (except tenant in tail after poſſibility of iſſue extinct) (4) do waſte in the lands they do ſo hold; this is a breach of the condition in law, and a forfeiture of their eſtate in ſo much as the waſte is committed (5). But if an infant, or feme covert, that hath ſuch an eſtate, ſhall make any ſuch eſtate, *&c.* this is no breach of the con- 11. When a condition in law ſhall be ſaid to be broken; or not. Forfeiture. * P. 149. Infant. Woman covert.

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(1) There is a material difference between a remedy by *re-entry*, and a remedy by *diſtreſs*, for the non-payment of rent. For where the remedy is by way of *re-entry* for non-payment, there muſt be an *actual demand* made *previous* to the entry, otherwiſe it is *tortious:* becauſe a condition of re-entry is in *derogation* of the *grant*; and the eſtate at law, being once defeated, is not to be reſtored by any ſubſequent payment; and it is preſumed, the tenant is reſident on the land, to pay the rent, and preſerve his eſtate; and therefore unleſs there be a *demand* made, and the tenant appears not to be on the land ready to pay his rent, the law will not allow the leſſor the benefit of *re-entry* to defeat the tenant's eſtate without a wilful default in him, which cannot appear without a *demand* hath *actually* been made upon the land. See further as to *demand* of rent, and in what caſes neceſſary, *Gilb.* on rents 73. and *Bac. Abr.* Condition (O. 2.)

(2) See further as to what will be deemed a breach of a condition in deed, *Bac. Abr.* Condition (O.) *Vin. Abr.* (C. c.) *Com. Dig.* Condition (M.)

(3) The condition, annexed by law, being that they ſhall not attempt to create a greater eſtate, than they are themſelves intitled to. 2 *Bl. Com.* 153. *Co. Lit.* 215.

(4) For although by the poſſibility of iſſue being extinct and gone, he is become in effect, as to the duration of his eſtate, only tenant for life, yet, having by the original creation of his eſtate, an eſtate of inheritance, the nature of the eſtate is not changed by the poſſibility of iſſue being extinct, but continues to have in it inherently an exemption from waſte.

(5) See ante 122.

dition in law. And yet if ſuch a perſon do waſte this is a breach of the condition in law. And ſo alſo if any ſuch perſon be an officer, and do any thing which is a cauſe of forfeiture in another; this will be a forfeiture in him or her alſo.

If any keeper of a park, without warrant, kill any deer, fell or cut any wood, and convert it to his own uſe, pull down the lodge, or any houſe within the park, uſed for hay for the deer, or the like; this is a breach of the condition in law. So alſo if a keeper ſhall not look to the game, but the deer be killed by his default, and damage come to the Lord; by this alſo the condition is broken. But the not attending upon ſuch an office for two or three days, if the Lord have no ſpecial loſs thereby, is not cauſe of forfeiture. Co ſuper. Lit. 223.

Offices that are for the adminiſtration of juſtice, or of clarkſhip in any Court of Record, or concerning the King's treaſure, revenue, account, alnage, auditorſhip, *&c.* have alſo conditions in law annexed to them; and therefore if ſuch officers ſhall ſell their offices or miſdemean themſelves in their offices, by this the condition in law may be broken, and they may forfeit them (1). Co ſuper Lit. 234.

12. Who may enter for a condition broken; and what perſons ſhall take advantage of a condition or a limitation; and what not.

As no man may create or annex a condition to an eſtate but he that doth create the eſtate itſelf, ſo neither can a man give or reſerve the power, title or benefit of re-entry and avoidance of an eſtate upon the breach of a condition to any other but to him, or them, or at leaſt to one of them that doth make the eſtate, his or their heirs, executors and adminiſtrators, *&c.* for it is a rule of the common law, that none may take advantage of a condition but parties and privies in right and repreſentation, as heirs, executors, *&c.* of natural perſons, and the ſucceſſors of politique perſons: and that neither privies nor aſſignees in law, as Lords by eſcheat, nor in deed, as grantees of reverſions, nor privies in eſtate, as he to whom a remainder is limited, ſhall take benefit of entry or re-entry by force of a condition (2). And therefore if a man had made a leaſe for a life reſerving rent, on condition that if the rent be behind, the leſſor, his heirs and aſſigns ſhall re-enter, and after had granted the reverſion to a ſtranger; this grantee ſhould not by the common law have had benefit by this condition. But if the leſſor had died, his heir, or the gardian in chivalry or ſocage of ſuch an heir, if he had been an infant * and in ward, might have taken advantage by the condition. And if one had been poſſeſſed of a leaſe for years, and had granted his term upon condition, and had died; his executors or adminiſtrators might have had advantage of this condition. Lit. Sect. 347. Plow. 175. Co. 3. 2. 347. 5. 56. Dier 131. Co. ſuper Lit. 214. 215. Doct. & Stu. 93. Perk. Sect. 830. 831. 833. 835. Plow. 488. 489.

* P. 150.

And at this day the law is ſtill the ſame as touching privies in blood; for an heir ſhall take advantage of a condition, though no eſtate deſcend to him from the anceſtor (3). And therefore if one be ſeiſed of land of the part of his mother, and he make a feoffment in fee of it on condition, and die, and the condition is broken; in this caſe the heir of the part of the father ſhall enter; but as ſoon as he hath entred, the Co ſuper Lit. 202. 12.

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(1) See further as to what ſhall be deemed a breach of a condition in law, *Com. Dig.* Condition (S.)

(2) An entry by a ſtranger without authority is good, if it be aſſented to afterwards, and will ſupport an ejectment, if the aſſent be before the demiſe in the declaration. See the caſe of *Fitchet* v. *Adams*, *Str.* 1128.

(3) Equity will relieve againſt an entry made by heir at law, for the breach of a condition. *Cha. Rep.* 85. *Underwood* v. *Swain.*

heir

heir of the part of the mother ſhall enter upon him and enjoy the land. And if a man be ſeiſed of land in the right of his wife, and he make a feoffment in fee of it upon condition, and die; the heir of the huſband ſhall enter for the condition broken, but the wife ſhall have the land. And ſo alſo is the law as touching privies in right and repreſentation; for executors and adminiſtrators ſhall take advantage of a condition now as heretofore. And ſo alſo ſhall the ſucceſſors of a Dean and Chapter, Biſhop, Arch-deacon, Parſon, Prebend, or any body politique or corporate, eccleſiaſtical or temporal; theſe ſhall take advantage of conditions as heretofore they did. So alſo the law is the ſame as touching privies in law; for they ſhall no more take advantage of a condition now than heretofore. But as touching grantees of reverſions, and privies in eſtate, there is ſome alteration made of the law; for by a new law it is provided, that all perſons which ſhall have any grant of the King of any reverſion, *&c.* of any lands, *&c.* which appertained to monaſteries, *&c.* as alſo all other perſons being grantees or aſſignees, *&c.* to or by any other perſon or perſons, and their heirs, executors, ſucceſſors and aſſigns, ſhall have like advantage againſt the feoffees, *&c.* by entry for non-payment of rent, or for doing waſte, or for other forfeiture, *&c.* as the ſaid leſſors or grantors themſelves ought or might have had (1).

Stat. 32 H. 8. cap. 34.

Co. ſuper Lit. 214. Plow. 27.

And for the true underſtanding of the ſenſe of this ſtatute and the ancient common law further touching this point, 1. Theſe diverſities muſt be obſerved to be taken, before the ſtatute will take place ſtill.

Co. 10. 36. F.N.B. 201.

1. Between a condition that doth require a re-entry, and a limitation that doth *ipſo facto* determine the eſtate without entry; for albeit a ſtranger might not take advantage of the firſt, yet he might take advantage of the laſt, by the common law. And therefore if a man at this day make a leaſe to another *quouſque*, or until *I. S.* come from *Rome*, or if a man make a leaſe to a * widow *ſi tamdiu in pura viduitate viveret*, or if a man make a leaſe to another for one hundred years if he live ſo long, and then the leſſor doth grant the reverſion to a ſtranger; in all theſe, and ſuch like caſes, the grantee of the reverſion may take advantage of the limitation; for after the eſtate is ended by the limitation he may enter.

* P. 151.

Co. 3. 64, 65. Co. ſuper Lit. 214. 11 H. 7. 17. Plow. 136.

2. Between a condition annexed to a freehold, and a condition annexed to a leaſe for years; for if before the ſtatute a man had made a gift in tail, or leaſe for life, on condition that if the donee, or leſſee, did not pay ten pounds by ſuch a day, the gift, or leaſe, ſhould be void, or ceaſe; in this caſe the grantee of the reverſion could not by the common law have taken advantage of the condition; for it could not be void, or ceaſe, but by entry, which could not be transferred to another. But if a leaſe for years had been made on ſuch a condition; a grantee of the reverſion might by the common law have taken advantage of this condition, for the eſtate in this caſe was by the breach of the condition *ipſo facto* void,

(1) See more amply what perſons may by force of this ſtatute of 32 *H.* 8. *c.* 34. take advantage of a condition broken, in *Co. Lit.* 215. *Cro. Eliz.* 832. 5 *Co.* 112. b. 2 *Leon* 33. *Vin. Abr.* Covenant (K. 3.) *Com. Dig.* Condition (O. 2.)

without

without entry. But now the grantee of the reverſion ſhall have advantage of the condition in both theſe caſes (1).

3. Between a condition in deed, and a condition in law; for by the common law not only the grantee of the reverſion, but alſo the Lord by eſcheat, may either of them have advantage of a condition in law for any breach in his own time. Co. ſuper Lit. 214.

2. Theſe reſolutions and judgements upon the ſtatute muſt be marked. 1. That the ſtatute, is general, and the grantee of the reverſion of every common perſon, as well as the King, may take advantage of conditions. 2. That the ſtatute doth extend to grants made to the ſucceſſor of the King, as well as to the King, albeit he only be named in the ſtatute. 3. That he that comes to the reverſion by fine, feoffment, grant, limitation of uſe, common recovery, or bargain and ſale, is ſuch a grantee as is within the intendment of the ſtatute. 4. That where the ſtatute doth ſpeak of feoffees, *&c.* it doth not extend to gifts in tail; and therefore if a gift in tail be upon condition, and after the donor doth grant the reverſion; this grantee ſhall never have any benefit of this condition. 5. That where the ſtatute doth ſpeak of grantees and aſſignees of the reverſion, hereby an aſſignee of part of the ſtate of the reverſion may take advantage of the condition; as if leſſee for life be, and the reverſion is granted for life, *&c.* or if leſſee for years be, *&c.* and the reverſion is granted for years, *&c.* in theſe caſes, the grantees of the reverſion ſhall have advantage of the conditions. Co. ſuper Lit. 214. Co. 5. 13.

† So if a leſſee for one hundred years make a leaſe for ten years, rendring rent, with condition of re-entry, and the firſt leſſee doth afterwards grant his term and eſtate to *I. S.* in this caſe, *I. S.* * is ſuch a grantee, and aſſignee of the reverſion, as ſhall take advantage of the condition. 6. That as well mediate, as immediate, grantees, *i. e.* the grantees of grantees *in infinitum*, are intended within this ſtatute. 7. That a grantee of part of the reverſion cannot take advantage of a condition by this ſtatute. And therefore if a leaſe be made of three acres, reſerving rent, upon condition, and the reverſion is granted of two of the three acres; in this caſe the rent ſhall be apportioned, but the condition is deſtroyed, except it be in the King's caſe. And yet a condition may be apportioned by the act of law, or by the wrong of the leſſee (2). As if a leaſe be made of two acres (the one of the nature of burrough Engliſh, and the other common law) upon condition, and the leſſor having iſſue two ſons, dieth, in this caſe, each of them ſhall enter for the condition broken. And if the leſſee upon condition make a feoffment of part of the land; this doth not deſtroy the condition. There is therefore herein a difference between a condition that is compulſory, and a power of revocation that is voluntary: for he that hath ſuch a power may by his own act extinguiſh it in part, by levying a fine of part of the land or otherwiſe, and yet his power may remain for the reſidue as in the caſe of a limitation; but in the caſe of a condition he cannot do ſo. 8. Such grantees as ſhall have advantage by this ſtatute, muſt be compleat grantees; and therefore grantees of reverſions by fine, or deed, muſt have atturnment ere they can take advantage of the condition. And yet if a

† Davy and Mathew's caſe per 2 juſtices Trin. 14. Jac. B. R.

* P. 152.

Co. 5. 112. 113. Co. ſuper Lit. 214.

Prerogative.

Apportionment.

Power of revocation.

Co. 5. 113. 114. Co. 8. 92.

(1) See accordingly and further *Vin. Abr.* Condition (N. d.) pl. 10.
(2) See accordingly, *Dyer* 308.

reverſion be granted by fine to one that hath no atturnment, and he grant it to another that hath an atturnment; in this caſe the ſecond grantee ſhall take advantage of the condition, albeit the firſt grantee ſhall not (1). And the leſſee muſt have notice of the grant of the reverſion, ere he in reverſion can take any advantage of a condition. And therefore it is, that if the leſſor bargain and ſell the land by deed indented and inrolled (in which caſe there needs no atturnment); or if the leſſor make a feoffment of the land, and ſo ouſt the leſſee, and the leſſee re-enter (which is an atturnment in law); the grantee, or feoffee, in theſe caſes, cannot take advantage of any condition, before he hath given notice to the leſſee of this grant of the reverſion. 9. Such as come in merely by act of law, or paramount, as the Lord of a villain, the Lord by eſcheat, the Lord that doth enter for mortmain, or the like, cannot take advantage of a condition within this ſtatute. And hence it ſeems it is, that if leſſee for forty years make a leaſe for thirty ſeven years on condition, and after ſurrender his eſtate to his leſſor; that the ſurrendree ſhall not have advantage of this condition. 10. † Albeit the words of the ſtatute be general, yet grantees and aſſignees ſhall not take benefit of every forfeiture by force of a condition, nor yet of all conditions, but only of ſuch as are inherent, * *i. e.* ſuch as are either incident to the reverſion, as for payment of rent, or for the benefit of the ſtate, as for reſtraining of waſte, for cauſing of reparations, making of fences, ſkowring of ditches, preſerving of woods, and the like. And of conditions that are collateral ſuch grantees ſhall not take benefit. And therefore if the condition be for payment of a ſum of money in groſs, to reſtrain alienation, for the delivery of corn, wood, or the like, the grantee of the reverſion of the land ſhall not have advantage of it by this ſtatute; for theſe remain as they were before the ſtatute, at the common law. 11. Such conditions as are on the part of the leſſor, it ſeems are not within this ſtatute; and therefore if one make a leaſe for years, on condition that if the leſſor, his heirs or aſſigns, pay ten pounds to the leſſee at Lady-day, the leaſe to be void, and the leſſor doth grant the reverſion to a ſtranger before the day; it ſeems the grantee ſhall not take advantage of this; but the condition is gone.

Co. ſuper Lit. 214. Paſche 7. Jac. Co. B. per 2 Juſtices.

† Co. ſuper Lit. 215. Dier 309. Curia in Leek's caſe. Paſche 7. Jac. Co. B.

* P. 153.

Per Juſtice Bridgman.

If one make a leaſe for years rendring rent to him and his heirs, on condition that if it be not paid within fourteen days, that he and his heirs ſhall re-enter, and the rent is behind, and the leſſor doth demand it, and then die; in this caſe the heir may enter. But if he die before demand, the heir cannot make a demand, and ſo take advantage of that breach of the condition, which was in the time of his anceſtor (2).

Doct. & St. 35. 13 H. 4. 17.

If a man be poſſeſſed of land for twenty years in the right of his wife, and he make a leaſe of it for ten years rendring rent, with condition of re-entry for default of payment, and after the huſband die; in this caſe, the wife ſhall have the rent, but it ſeems ſhe ſhall not take advantage of the condition.

Perk. Sect. 834.

(1) For the doctrine of atturnment, ſee chapter 13. poſt.—Atturnment is rendered unneceſſary by the ſtatutes of 4 *Ann.* *c.* 16. § 9. and 11 *Geo.* 2. *c.* 19. § 11.

(2) See before in page 145.

If a leaſe be made to *I. S.* on condition that if ſuch a thing be, or be not done, that the land ſhall remain to *I. D.* or that *I. D.* ſhall enter; in this caſe *I. D.* ſhall never take advantage of this condition, either by the common law, or by this Statute. Co. 1. 85. ſuper Lit. 379. Dier 127. 117.

13. Where entry or claim is needfull to avoid an eſtate on condition; and where a man may take advantage of a condition without entry, or claim; and where not.

Regularly where a man will take advantage of a condition, if he may enter, he muſt enter, and when he cannot enter, he muſt make a claim; for an eſtate of freehold or inheritance will not ceaſe without entry or claim (1). And he that is to have advantage by the condition, may wave his advantage if he will. And until ſuch entry or claim made, the party that ſhould enter can make no good eſtate of the thing to any other. But herein a difference is to be obſerved in the penning of a condition, between a leaſe for years, and a leaſe for life, or a greater eſtate: for if a leaſe for years be made, on condition that upon ſuch a contingent the eſtate ſhall ceaſe, or the leaſe ſhall be void; in this caſe when the thing doth happen, the leaſe is *ipſo facto* void without entry or claim. But otherwiſe it is of a leaſe for life, albeit there be * the ſame words in the condition. And if one make a leaſe for years, on condition that if ſuch a thing be done, the leſſor ſhall re-enter; in this caſe an entry is needful to avoid the eſtate (2). Co. ſuper Lit. 218. 237.

* P. 154.

If one make a feoffment in fee, gift in tail, or leaſe for life, on condition that upon ſuch a contingent the eſtate ſhall be void; in this caſe there muſt be an entry made, after the condition is broken, to avoid the eſtate. So if one bargain and ſell his land by deed indented and inrolled, with proviſo that if the bargainor pay, *&c.* then the eſtate ſhall ceaſe and be void, and he doth pay the money; in this caſe the eſtate is not reveſted in the bargainor, before an actual re-entry is made. And ſo it is alſo if lands be deviſed to a man and his heirs, on condition that if the deviſee do not pay twenty pounds at a day, his eſtate ſhall ceaſe and be void; in this caſe the eſtate is not void until an actual re-entry be made. And ſo alſo it is if a reverſion, remainder, advowſon, rent, common, or the like, be deviſed on ſuch a condition; in theſe caſes there muſt be a claim, before the eſtate will be determined. And therefore if a man grant ſuch a thing to another and his heirs, on condition that if the grantor pay twenty pounds on ſuch a day, the eſtate of the grantee ſhall ceaſe or be void, and the grantor doth pay the money according to the condition; in this caſe the eſtate is not reveſted in the grantor before a claim made at the church in caſe of an advowſon, and in other caſes upon the land. But in caſe where a man cannot make an entry or claim, there the law will not compel him to it. And therefore if one grant land to another for five years, on condition that if he pay to the grantor within the two firſt years forty marks, that then he ſhall have the fee, otherwiſe but for term of five years, and livery of ſeiſin is made accordingly, and the grantee doth not pay this money; in this caſe after the

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(1) *Entry* by a legal owner, is a notorious act of ownerſhip, and equivalent to a feodal inveſtiture by the lord, and gives the owner ſeiſin, and makes him compleat owner of the eſtate and capable of conveying it from himſelf, either by deſcent or purchaſe. See further, as to the nature and manner of making entry and claim, *Co. Lit.* 15. 254. b. 3 *Bl. Com.* 175. 4 vol. 147.

(2) No one can enter for a condition broken as bailiff to another, without the ſpecial command of him to whom he is bailiff. *Mo.* 52.

two

two years are paſt, the freehold ſhall be in the grantor without entry or claim; for as this caſe is, he cannot enter, but he muſt ouſt the leſſee of his term. So if I grant a rent charge out of my land upon condition; when the condition is broken, the rent is extinct, and there needs no claim. So if a man make a feoffment of land to me in fee, on condition that I ſhall pay him twenty pounds ſuch a day, *&c.* and before the day I let the land to him for years, rendring rent; and after, the condition is broken; in this caſe he may retain the land without entry or claim, and the rent is extinct. So if one covenant to ſtand ſeiſed to the uſe of himſelf for life, or otherwiſe, and then after to the uſe of others, with a proviſo of revocation, *&c.* and after, he doth revoke it; in this caſe all the eſtates are reveſted in him without entry or claim.

Co. 4. 120. Perk. Sect. 840. Plow. 186. 482. 14 H. 8. 17.

It is generally true, that he that doth enter for a condition broken, doth make the eſtate void *ab initio*, and that he ſhall be in of his firſt eſtate in the ſame courſe and manner as it was when he * departed with the poſſeſſion, and at the time of the making of the condition (1). And hence it is, that if there be any charge or incumbrance on the land, as if leſſee of land upon condition grant a rent-charge out of the land, or enter into a ſtatute, or recogniſance, and the conuſee have the land in execution, and this charge is after the condition is made; in this caſe, when the condition is broken, and the party doth re-enter, he ſhall by relation avoid the rent, ſtatute, and recogniſances, and hold the land freed from them all. And if an eſtate be to paſs by way of increaſe, upon condition; or a leaſe is to be made upon a condition precedent; when the condition is performed, the party ſhall hold his eſtate free from all after charges and clogs. And if a man enter for breach of a condition in law, he ſhall avoid all charges and acts done after that thing is done, which doth produce the forfeiture; but he ſhall not avoid any thing done before that time; for he muſt take the thing as he finds it: as if a houſe, or land, belong to an officer, in reſpect of his office, and he grant a rent out of it for his life, and then he doth forfeit it; in this caſe the rent ſhall continue. And if leſſee for life of land grant a rent out of it, and then make a feoffment in fee of the land; in this caſe the rent ſhall continue, and the leſſor cannot avoid. But if leſſee for life of land make a feoffment in fee of it, and then grant a rent out of the land; in this caſe the leſſor ſhall avoid it. And if a leſſee grant a rent out of his land, and then do waſte, and the leſſor recover the land, he cannot avoid this rent, but ſhall hold the land charged with it. But if the leſſee do waſte firſt, and then he grant a rent-charge to a ſtranger out of the land, and after the leſſor recover the place waſted; in this caſe he ſhall hold the land diſcharged. And if leſſee for life make a leaſe for years, and after enter upon the leſſee for years, and make a feoffment in fee; this ſhall not avoid the leaſe for years. And if a man make a leaſe for years, rendring rent, with clauſe of entry for non payment, and the leſſee doth make underleaſes of part of this land, and after the rent is

Co. ſuper Lit. 234. Perk. Sect. 843, 844. Co. ſuper Lit. 233.

Crompt. Jur. 64, 65.

14 When a condition broken ſhall make the eſtate, &c. void, *ab initio*. And when not. And to what intents the leſſor, feoffor, &c. ſhall be adjudged by his re-entry to be in of his firſt eſtate And to what intents not.

* P. 155.

(1) Regularly it is true, that he that entereth for a condition broken ſhall be ſeiſed of his firſt eſtate; but that faileth in many caſes: ſee the inſtances, in *Co. Lit.* 202. a. See further in *Com. Dig.* Condition (O. 6.) *Vin. Abr.* Condition (P. d.)

unpaid, and the leſſor doth enter; in this caſe he ſhall have all the land, and avoid all the under leaſes. But if there be any covinous practiſe in the caſe, the undertenants may have remedy in equity. And if a leaſe be made for life, the remainder in tail, on condition; in this caſe if the condition be broken, both the eſtates be avoided. *Et ſic de ſimilibus.* But this general rule doth fail in divers particulars: as if a man be ſeiſed of land in the right of his wife, and he maketh a feoffment in fee by deed indented, upon condition that the feoffee ſhall deviſe the land to the feoffor for life, *&c.* and the huſband dieth, and then the condition is broken; in this caſe the heir of the huſband ſhall enter, and yet he ſhall not have the eſtate of the feoffor, for this doth preſently after his entry vaniſh away. So if a tenant in ſpecial tail hath * iſſue, and his wife dieth, and tenant in tail maketh a feoffment in fee upon condition, the iſſue dieth, the condition is broken, and then the feoffor doth re-enter; in this caſe, he ſhall have but an eſtate for life, as tenant in tail after poſſibility of iſſue extinct. So if a leſſee for life, or years, make a feoffment in fee on condition, and after doth enter for the condition broken; in this caſe he ſhall not be in the ſame courſe, for now his eſtate is ſubject to entry for forfeiture, though he be tenant for life ſtill. So if a diſſeiſor be of certain land, and he die ſeiſed thereof, and his heir is in by deſcent, and the diſſeiſee enter upon the heir, and infeoff a ſtranger upon condition, and the heir of the diſſeiſor doth enter upon the feoffee, and the diſſeiſee doth ſue a writ of entry *ſur diſſeiſin* againſt the heir of the diſſeiſor, and doth recover and hath execution, and the feoffee on condition doth re-enter and after the condition is broken; in this caſe the feoffor is not in in the ſame caſe; for now the diſſeiſor cannot enter upon him, as he might before And in ſome caſes the feoffor by his re-entry ſhall be in in his former eſtate, but not in reſpect of ſome collateral qualities: as if tenant by homage anceſtrel, make a feoffment of the land he doth ſo hold, in fee, on condition, and entreth for the condition broken; in this caſe it ſhall never be held in homage anceſtrel again. And ſo if a copyhold eſcheat be, and the Lord make a feoffment in fee upon condition, and entreth for the condition broken; in this caſe the cuſtom annexed to that land is gone. So if there be Lord and tenant by fealty and rent, and the Lord is in ſeiſin of the rent, and granteth his ſeigniory to another and his heirs, on condition, and the tenant doth atturn and payeth his rent to the grantee, and the condition is broken; the Lord diſtraineth for his rent, and reſcous is made; in this caſe the former ſeiſin ſhall not enable him to have an aſſiſe without new ſeiſin. If there be Lord and tenant, and the Lord diſſeiſe the tenant of the tenancy, and thereof doth enfeoff a ſtranger on condition, and after the condition is broken, and the Lord enter, and the tenant doth enter upon him; in this caſe the ſeigniory is not revived.

Equity.

Co. 10. 41.

Co. ſuper Lit. 202. Perk. Sect. 842, 843.

* P. 156.

If tenant in tail make a feoffment in fee, on condition, and dieth, and the iſſue in tail within age doth enter for the condition broken; in this caſe he ſhall be in firſt as tenant in fee-ſimple, and heir to his father, and then ſhall be preſently remitted:

mitted: but if he be of full age he ſhall not be remitted (1).

Co. ſuper Lit. 202, 203.

If one make a feoffment of white acre, and black acre, on condition, *&c.* and that he ſhall enter into black acre only; in this caſe upon breach of the condition, he ſhall enter into that part only.

If the words of a condition be, that if ſuch a thing be not done, the feoffor or leſſor ſhall enter into the land, and take the profits thereof until the thing be done, or to the like effect; in this caſe * if the feoffor, or leſſor, enter upon the breach of the condition, he doth not avoid the eſtate, or get any thing by his entry, but the poſſeſſion only in the nature of a pledge, or a diſtreſs, until the thing be done; and if the condition be for the payment of the rent, he ſhall hold the land until he be paid the rent. And if the words be [that the feoffor, *&c.* ſhall enter and take the profits, until thereof he be ſatisfied, or until he be ſatisfied or paid the rent] in the firſt caſe as ſoon as he is paid, either by the receiving of the profits, or payment of the rent behind, or both together; and in the laſt caſe as ſoon as he is paid the rent by the feoffee or leſſee, the feoffee or leſſee may enter again into the land (2).

* P. 157.

Co. ſuper Lit. 207. 219. 15 H. 7. 13. Dier 262.

If a condition be poſſible in its creation, and after become impoſſible by the act of God, the condition is diſcharged and gone for ever, and the eſtate is abſolute (3). As if a feoffment be be made to me, on condition that I ſhall reinfeoff the feoffor before a day, or on condition that I ſhall appear at *Weſtminſter* in the King's Bench ſuch a day, or on condition that I ſhall go to *Paris* about the affairs of the feoffor before ſuch a day, and before the day appointed it doth happen that I die; in all theſe caſes the condition is diſcharged. So if the condition of a feoffment be, that if the feoffor, or his heirs, pay ten pounds to the feoffee ſuch a day, and before the day the feoffor dieth without heir; in this caſe the condition is gone. And if the condition become impoſſible in part only, then it is diſcharged for ſo much only (4).

15. When and by what means a condition ſhall be diſcharged and extinguiſhed for ever, or ſuſpended for a time: or not.

1. By the act of God.

Conditions impoſſible.

Perk. Sect. 819.

If there be Lord and tenant, and the tenant doth enfeoff a ſtranger on condition, and the feoffee die without heir, ſo that the tenancy eſcheat; in this caſe the condition doth continue, and the Lord muſt hold it ſubject to the condition.

Co. ſuper Lit. 215. Co. 4. 120.

Albeit a condition cannot be divided by the act of the parties, but it will be deſtroyed, yet it may be divided by the act of law; and therefore if a leaſe for years be made of two acres of land (the one of the nature of Burrough Engliſh, and the other at the common law) on condition, and the leſſor having iſſue two ſons dieth; in this caſe albeit the condition be divided, yet it is not gone, but doth continue ſtill, and each of them may enter for the condition broken. But if one that hath a condition knit unto his reverſion, grant part of his reverſion to a ſtranger; the condition is deſtroyed in all, for it cannot be apportioned

2. By the act of law.

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(1) Becauſe he might have had his formedon againſt the feoffee, and the entry for the condition is his own act. *Co. Lit.* 202. b. *Remitter* is an operation of law, upon the meeting of an ancient right remediable, and of a latter ſtate, in one perſon, where there is no folly in him, whereby the ancient right is reſtored and ſet up again, and the new defeaſible eſtate cleared and vaniſhed away. *Co. Lit.* 347. b. For the doctrine of Remitter, ſee 3 *Bl. Com.* 19. 189. and fully in *Com. Dig.* and *Vin. Abr.* tit. Remitter.

(2) See further what act deſtroys a condition, *Com. Dig.* Condition (Q).

(3) See accordingly *Co. Lit.* 206. a.—*Roll. Abr.* 449. 2 *Leon.* 155.

(4) And if the condition conſiſts of two parts, one of which was impoſſible at the time of making the condition, yet it is a good condition, and the other ought to be performed, *Cro. Eliz.* 780.

by the act of the parties, as it may by the act of the law or the wrong of the leſſee (1).

3. By the act of the parties.

A condition may be deſtroyed in the very creation of it; as if one deviſe lands for life, with expreſs words of a condition, and not words of limitation, or words that may be ſo taken, the remainder over to a ſtranger; in this caſe the ſtranger cannot enter, neither is the remainder good, nor the condition effectual. Or it may be diſcharged, by matter *ex poſt facto:* as in the examples following. * If one make a feoffment in fee of land, upon condition, and after, and before the condition broken, he doth make an abſolute feoffment, or levy a fine of all or part of the land, to the feoffee, or any other; by this the condition is gone and diſcharged for ever. And yet if one grant a rent out of his land, upon condition, and after make a feoffment of this land, this doth not extinguiſh the condition. And if a fine in this caſe be levied in purſuance of a former agreement; as if one by indenture bargain and ſell his land to another, and in the indenture there is a covenant that all other aſſurances ſhall be to the uſe of the bargainee, according to the firſt agreement, and the bargain and ſale hath a condition annexed, that the bargainee ſhall make a feoffment of part of the land to the bargainor, and after the bargainor doth levy a fine to the bargainee in corroboration of the firſt bargain: in this caſe the condition is not extinct, but ſaved by the original agreement. And if one make a feoffment in fee of land upon condition, and after, and before the condition broken, he doth make a leaſe for years only of the land, or part of it, to the feoffee or any other; by this the condition is ſuſpended for that time. And if the feoffor, after a feoffment made of land upon condition, enter upon all or part of the land, and be impleaded, and loſe it; by this the condition is gone for ever. And if he enter and hold the poſſeſſion only; by this the condition is ſuſpended during his poſſeſſion; and if he hold the poſſeſſion ſo long that the feoffee cannot perform the condition; the condition is diſcharged for ever. And if one make a feoffment of land upon condition, and after, and before the condition broken, the feoffee doth make a feoffment of all or part of the land, to the feoffor; by this the condition is gone for ever. And if the feoffee make a leaſe for life, or years only, of part of the land; by this the condition is ſuſpended for that time. But if the feoffee make a feoffment in fee, leaſe for life, or years to a ſtranger; this is no extinguiſhment nor ſuſpenſion of the condition. And if the condition be to pay money, or do any ſuch collateral thing; if in this caſe the feoffee make a leaſe to the feoffor, this doth not ſuſpend the condition.

Co. 8. 59. the Lord Cromwel's caſe. Dier 309. Co. ſuper Lit. 265. 379. Co. 10. 41.

* P. 158.

Co. 2. 59. Perk. Sect. 819, 820. 163. Lit. Bro. Sect. 212. Co. ſuper Lit. 219.

Co. 7. 14. 4. 52. Lit. Bro. Sect. 212. 85. Co. ſuper Lit. 218.

Releaſe.

If the feoffor, or leſſor, releaſe to the feoffee, or leſſee, all conditions, or all demands in the land, or confirm the eſtate of the feoffee without condition, *&c.* by either of theſe means the condition is deſtroyed and gone for ever.

Perk. Sect. 823. Co. 1. 147. See Releaſe and confirmation.

If one make a leaſe for life, or years, of land on condition, and after grant the reverſion of part of this land; hereby the

Co. 2. 59. Perk. Sect. 163. Co. 4. 119.

(1) See fully in what caſes the non-performance of a condition ſhall be excuſed by the Act of God, or by Act of Law,—*Com. Dig.* Condition (L. 12.) *Bac. Abr.* Condition (Q.) *Vin. Abr.* Condition (G. c.) to (K. c.)

condition is deſtroyed for ever. And if he make a leaſe of part of it only; by this the condition is ſuſpended.

Perk. Sect. 763. 765. 764. A condition may be extinct, or ſuſpended, by the intermarriage of the parties to the condition; as if a feoffment be made, by a woman, on condition to pay ten pounds, or on condition to infeoff * her by a day certain, and before the day they two do intermarry, and the marriage doth continue until after the day; in this caſe the condition is gone. And if the condition be to re-enter for not payment of rent; the condition ſhall be ſuſpended, and no rent be paid during the coverture. * P. 159.

Co. 4. 119. 5. 32. 2. 39. 714. Dier 309. If a leaſe be made for years, on condition that the leſſee or his aſſigns ſhall not alien without the licence of the leſſor, and the leſſor licence the leſſee alone to alien, or licence him to alien a part of the land, or licence him to alien all the land for a time; or if the leaſe be to three on ſuch a condition, and the leſſor licence one of them to alien; in all theſe caſes, the condition is gone for ever.

Perk Sect. 766. If one had enfeoffed me, on condition that I ſhould pay him ten pounds at Eaſter, and before the time he had entred into religion, and made me his executor, and had not been dearraigned; in this caſe the condition had been gone for ever.

Perk. Sect. 822. If I be ſeiſed of land in fee, and take a wife, and during the marriage enfeoff a ſtranger on condition, and die, and the feoffee endow my wife of her third part; in this caſe the condition is not deſtroyed, and yet the third part is freed from the condition, but the reverſion of that third part is not freed from the condition. And if ſhe grant her eſtate again to the feoffee, the condition is revived. So if there be Lord and tenant, and the tenant make a feoffment in fee upon condition, and the feoffee is attainted of felony, *&c.* ſo that the tenancy doth eſcheat; in this caſe the condition is not gone, but the tenancy is charged with it.

Co. 3. 64. ſuper Lit. 211. If a feoffment or leaſe be made, rendring rent, on condition for non-payment a re-entry, and the feoffor, or leſſor after the breach of the condition doth diſtrain, or bring an aſſiſe for the rent, or doth accept the rent at another day; hereby the condition is not deſtroyed, but it is diſcharged for that time; ſo that the feoffor, or leſſor, cannot take any advantage of that breach: and if the act to be done by the condition be a collateral act, as not to alien, or the like, and the condition is broken, and the feoffor not having notice thereof, doth accept the rent; in this caſe alſo, and by this means, the condition is not diſcharged (1).

4. By the act of a ſtranger.

Lit. Sect. 476, 477. Co. ſuper Lit. 237. If one diſſeiſe the feoffee, or the heir of the diſſeiſor, or any other that hath lands by a juſt title, and thereof enfeoff a ſtranger on condition, and the land is lawfully recovered from him, by him that hath the title; hereby the condition is deſtroyed for ever. And if a diſſeiſor make a feoffment in fee, on condition, and after the diſſeiſee doth enter upon the feoffee on condition; this doth extinguiſh the condition. But if the diſſeiſee releaſe to the feoffee on condition; this releaſe doth not diſcharge the condition. But if a diſſeiſor make a leaſe for life, and the leſſee for life make a feoffment in fee on

(1) See more amply in what caſes conditions ſhall be diſcharged by the act of the parties, *Bac. Abr.* Condition (Q. 3.) *Vin. Abr.* Condition (K. d.) *Com. Dig.* Condition (L. 4).

condition,

condition, and the diſſeiſee releaſe to the feoffee of the tenant for life, by this * the condition in law is deſtroyed. And if the feoffee upon condition make a feoffment over, without condition, and the diſſeiſee releaſe to the ſecond feoffee; by this the condition is deſtroyed, be the releaſe before the condition broken, or after. And if feoffee on condition make a leaſe for life, and the feoffor releaſe to the feoffee on condition, or leſſee for life, all conditions, or all demands to the land; by this the condition is diſcharged. And if the feoffee on condition make a feoffment to another on condition, and after, the firſt feoffor doth enter for breach of the condition; hereby the ſecond feoffment, and the condition alſo, is gone for ever.

* P. 160.

Perk. Sect. 823. 821.

If a man ſeiſed of land in fee, let it to a ſtranger for years, and one that hath no right doth ouſt the leſſee, and thereof die ſeiſed, and his heir is in by deſcent, and he doth make a feoffment to a ſtranger upon condition, upon whom the leſſee for years doth enter within the term, claiming his term; in this caſe the leſſee ſhall hold the land diſcharged of the condition.

Perk. Sect. 820.

And now we paſs to a *covenant*, being another part of a deed.

CHAP. VII.

CHAP. VII.

Of a Covenant.

Terms of the law Plow. 308.

A Covenant is the agreement or conſent of two or more by deed in writing, ſealed and delivered, whereby either or one of the parties doth promiſe to the other, that ſomething is done already, or ſhall be done afterwards (1). And he that makes the covenant is called the covenantor; and he to whom it is made, the covenantee. 1. Covenant. *Quid.* Covenantor. Covenantee.

Termes of the law. tit. Covenant. Co. 4. 80. 5. 17. F. N. B. 145. 146. Dier 338. 257.

And this is either expreſs, or in deed, *i. e.* when the covenant is expreſſed in the deed: as when *A.* by deed doth covenant with *B.* to ſerve him for a year, and *B.* doth covenant with *A.* to pay him ten pounds for his ſervice. Or it is implied, or in law, *i. e.* when the deed doth not expreſs it, but the law doth make and ſupply it. As, when one doth make a leaſe for years by the words [demiſe or grant] without any expreſs covenant for quiet enjoying; in this caſe the law doth intend and make ſuch a covenant on the part of the leſſor, which is, that the leſſee ſhall quietly hold and enjoy the thing demiſed againſt all perſons, at leaſt having title under the leſſor, and at leaſt during the leſſor's life, and (as ſome think) during the whole term; and hereupon an action of covenant may be brought againſt him in the reverſion; ſo that if the heir that is in by deſcent, put out the termor of his father, the termor may have * this action againſt him (2). A covenant is alſo either real, *i. e.* that whereby a man doth bind himſelf to paſs a real thing, as lands or tenements; as a covenant to levy a fine of land, in which caſe the land itſelf is to be recovered; or when it doth run in the realty ſo with the land that he that hath the one, hath or is ſubject to the other, and ſo a warranty is called a real covenant. Or it is perſonal, *i. e.* when it doth run in the perſonalty, and not with the land, but ſome perſon in particular ſhall have benefit by it, or be charged with it: as when a man doth covenant to do any perſonal thing, as build or repair a houſe, ſerve him, or the like (3). And theſe alſo are ſome of them ſaid to be inherent, *i. e.* ſuch as are converſant about the land; as that the thing demiſed ſhall be quietly enjoyed, ſhall be kept in reparations, ſhall not be aliened; or if it be to be ſold, that the leſſor ſhall have the firſt refuſal; to pay rent, not to cut down timber trees, or do waſte, to fence the coppices when they be new cut, to make further aſſurance, or the like. And ſome of them are ſaid to be collateral, *i. e.* that are converſant about ſome collateral thing that doth no- 2. *Quotuplex.* * P. 161.

(1) A covenant is not a duty, nor cauſe of action, till it be broken; and therefore it is not diſcharged by a releaſe of all actions: and when it is broken, the action is not founded merely upon the ſpecialty, as if it were a duty, but favours of treſpaſs; and therefore an accord is a good plea to it; and ends in damages. *Aléyn* 39.—See further as to the nature of a covenant, in *Gilb.* Law of Covenants, *chap.* 1. and 2 *Bl. Com.* 304.

(2) Where the covenant is created by law, the covenantee cannot bring an action of covenant, if he be not ouſted by one, who has a title; but it is otherwiſe in caſe of an expreſs covenant. 2 *Brownl.* 161. The *diſtinction* between *implied* covenants by operation of law, and *expreſs* covenants, is, that expreſs covenants are taken more ſtrictly. *per* Ld. *Mansfield.* 3 *Burr.* 1639.

(3) What ſhall be a real, and what a perſonal covenant, ſee *Vin. Abr.* (G. 2.) *Bac. Abr.* Covenant (E.) *Com. Dig.* Covenant (A. 2.) *Gilb.* Law of Covenants 105.

thing at all, or not ſo immediately, concern the thing granted; as to pay a ſum of money in groſs, to build a houſe in another man's ground, to make a feoffment or leaſe of other land, to give other ſecurity to perform the covenants, or to pay the rent, or that the leſſor ſhall diſtrain for the rent in ſome other land than that which is demiſed, or the like; theſe are collateral covenants (1). There is alſo a covenant to ſtand ſeiſed of land to uſes, which is now become a kind of conveyance of land; for which read *uſes* at large (2).

3. The uſe and operation of it.

The moſt frequent uſe of a covenant is to bind a man to do ſomething *in futuro*, and therefore it is for the moſt part executory; and if the covenantor do not perform it, the covenantee may have thereupon for his relief an action, or writ of covenant, againſt the covenantor, ſo often as there is any breach of the covenant (3). And this writ of covenant is therefore defined to be a writ lying where a man is bound by a covenant in a deed, and hath broken it. And in this caſe commonly the party damnified ſhall recover damages only for the breach: and if he have a judgement in an action brought for one breach, and after the covenantor doth break the covenant again; in this caſe he may bring a new action, and ſo for every breach. But a covenant doth ſometimes alſo make a tranſmutation of a property and poſſeſſion of things, as in caſe of a covenant to ſtand ſeiſed of land to uſes, for which ſee *Uſe*. And in caſe where one doth covenant that another ſhall have a piece of land for five years; this is a good leaſe for five years, for which ſee *leaſe*. And in caſe where one doth covenant with another, that if he pay him ten pounds ſuch a day, he ſhall have all his cattle in *Dale*, or his leaſe for years he hath of the manor of * *Dale*; in this caſe it ſeems if he pay the money at the time he ſhall have the property of the goods, and of the leaſe for years. It is ſaid therefore that in ſome caſes upon the writ of covenant the party ſhall recover the land itſelf out of which he hath been ejected.

Co. 1. 154. Lit. Bro. Sect. 309. 27 H. 8. 16. Plow. 308. F.N.B. 145.

A writ or action of covenant. *Quid.*

Uſe.

Leaſe.

Contract.

* P. 162.

4. What ſhall be ſaid a good covenant in a deed, upon which an action of covenant may be had: and what not. 1. In reſpect of the manner of making it.

A covenant may be in the affirmative, or in the negative (4). And it may be executed, *i. e.* that a thing is done already; or executory, *i. e.* that a thing ſhall be done hereafter; and theſe are all good. But if it be of a thing preſent, as if I covenant that my horſe is yours; this is void. [a] And theſe covenants being made by a deed poll are as good and effectual, as when they are made by a deed indented, ſo as the party have the deed to ſhew; for otherwiſe a common perſon cannot have an action of covenant; for it doth not lie upon a verbal agreement, neither can it be grounded without a writing, except it be by a ſpecial cuſtom, as in *London* (5). [b] And there needs not in this caſe formal and orderly words, as covenant, promiſe, and the like, to make a covenant on which to ground an action of covenant (6); for a covenant may be had by any

Plow. 330. 27 H. 8. 16.

a F. N. B. 145. G. Co. 3. 63. Ewer's caſe. 8 Jac.

b Lit. Bro. Sect. 450. Co. 2. Lord Cromwell's caſe. Dier 57. 150. 21 H. 7. 37. 40 E. 3. 5.

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(1) As to collateral covenants, ſee 4 *Burr.* 2446.—2 *Wilſ.* 27.

(2) See accordingly and further as to the different kinds of covenants, 1 *Wood* 354.

(3) It is a general rule in *equity*, that what is covenanted to be done, is conſidered as actually done, 3 *Atk.* 534.

(4) As to affirmative and negative covenants, ſee *Vin. Abr.* Covenant (D. a.) and 1 *Wood* 356.

(5) Or by the cuſtom of any other place; tho' ſuch cuſtom ſhall be taken ſtrictly. 1 *Leon* 2.

(6) Any words, which ſhew the parties concurrence to the performance of a future act, being effectual for that purpoſe. 1 *Leon* 324. 1 *Ch. Ca.* 294.—The word *covenant* is not neceſſary to make a covenant. 1 *Roll. Abr.* 518.—No particular technical words are requiſite towards making a covenant. 1 *Burr.* 290.

other words; and upon any part of an agreement in writing, in what words ſoever it be ſet down, for any thing to be or not to be done, the party to or with whom the promiſe or agreement is made may have this action upon the breach of the agreement (1). And therefore if theſe words be inſerted in a deed amongſt other covenants [that the leſſee ſhall repair, provided always that the leſſor ſhall allow timber; or that the leſſor ſhall ſkowre ditches, provided always that the leſſor do carry away the earth;] theſe are good covenants on both ſides.

c Adjudged Paſch. 14. Jac. B. R. Sir Thomas Bret verſus Cumberland's.

[c] And if a leaſe be made of houſes by patent to *I. S.* for twenty one years, and therein is inſerted this clauſe [and that the ſaid *I. S.* and his aſſigns ſhall repair the houſes when they ſhall be decayed;] this is a good covenant. And ſo alſo it is where theſe or the like words be inſerted amongſt other covenants [and that the leſſee ſhall pay ten ſhillings a year rent, or that the leſſee ſhall not alien;] theſe ſhall be ſaid to be covenants, unleſs it be in ſuch caſes where there is ſome other means to inforce the doing of the thing. As if in caſe of the rent there be a clauſe of diſtreſs, re-entry, or *nomine penæ*. And in all caſes regularly where words that do begin the ſentence be conditional, and have the effect of a condition, and do give another remedy, there they ſhall not be conſtrued to make a covenant, as in the caſes of condition before. And yet if words of condition and words of covenant be coupled together in the ſame ſentence, [as provided always, and it is covenanted, or the like;] in ſuch caſes the words may be conſtrued to make a covenant and a condition both.

Bro. Covenant 21. 26. & Co. & Dier ubi ſupra.

Dier 150. Co. 1. 155.

If a man make a leaſe for life by indenture, and therein are inſerted theſe words [it is provided that if the leſſee die within ſixty * years, that then his executors and aſſigns ſhall have the land until the ſixty years be ended, to be accounted from the date of the indenture;] this albeit it be not a good leaſe, yet it is a good covenant. Leaſe.

* P. 163.

Bro. covenant 38. deſcent 50. 21 H. 7. 32.

If a man make a leaſe for years, and warrant it to the leſſee, his heirs, and aſſigns, during the term; or he that hath right to the land confirm the eſtate of the leſſee for years with warranty; in theſe caſes, howbeit this be not a warranty, nor in the nature of a warranty, yet it ſhall be conſtrued a good covenant in law for the quiet enjoying of the thing.

Perk. Sect. 69.

If the Lord grant to his tenant, that he will not diſtrain him in ſuch a part of his land for his rent; this ſhall be taken to be a good covenant, by this word [grant] (2).

2. In reſpect of the matter or ſubſtance of it.

See Weſt. Symb. in his firſt part toto. & infra. Plow. 308. 302. 27 H. 8. 16. Dier 13. 324. 253, 251. Fitz. Covenant 1.

A covenant to do any thing that for the ſubſtance and matter of it is lawful, or not to do any thing that for the matter of it is unlawful, is good: as if the grantor covenant that he is ſeiſed or poſſeſſed of a good eſtate of and in the thing he doth grant, and hath power to grant it. That the grantee ſhall quietly enjoy it. That it is and ſhall be free from incumbrances. That he will make further aſſurance if need be. That if the grantee be evicted, he ſhall pay no rent. That

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(1) And therefore if by articles of agreement it is ſaid, *that it is intended a fine ſhall be levied*, this amounts to a covenant to levy it. 2 *Mod.* 91. So alſo in an indenture of apprenticeſhip, there are not inſerted the formal words of a covenant, but only an agreement that ſuch things ſhall be done by the parties. 1 *Roll. Abr.* 519.—*Gilb.* Covenant 14.

(2) See more fully by what words an expreſs covenant may be created, *Vin. Abr.* Covenant (C.) *Bac. Abr.* Covenant (A.) *Gilb. chap.* 2.

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the grantee ſhall pay rent. That he ſhall diſcharge all dues, and ſave and keep harmleſs the grantor. That he ſhall not alien the thing granted; or, if he do, that the grantor ſhall have the firſt refuſal thereof. That he ſhall not do waſte. That he ſhall have houſeboot, and hayboot. That the grantor or grantee ſhall repair the old houſing, or build new. That he ſhall pay and diſcharge all rents and payments iſſuing out of the land. That he ſhall not fell trees; or, if he do, that he ſhall pay to the grantor ſo much in money for every tree. That if he fell any underwood, he ſhall fence it. That he ſhall make an eſtate of land. That he ſhall be quit of any ſuit, ſervice, or payment. That he ſhall give ſufficient ſecurity to *I. S.* for an hundred pounds he doth owe him; all theſe, and the like covenants, are good. And generally where a condition for the matter of it is good, a covenant comprehending the ſame matter is good alſo. But if the matter required to be or not to be done by the covenant, be, for the ſubſtance thereof, unlawful, then is the covenant void, and doth not bind: and therefore if one covenant to kill or rob a man, or the like; this covenant is void. So if one covenant that he will maintain another in his ſuits, or that he will not appear in inqueſts, or that he will break the peace, or that he will foreſtall corn, or the like; theſe covenants are void. So if one be tenant in fee-ſimple of land, and he covenant that he will not alien it; this covenant is void. So if a man be a tradeſman, and he covenant that he will not uſe or exerciſe his trade; this reſtraint, if it be abſolute and continual, is void; but if it be *ſub modo* only, as that he ſhall not uſe his trade at one time, or in one city or town only, * this covenant may be good. So if a man be by covenant reſtrained to ſow the land which hath been uſed to be ſowed, and this be either abſolutely, or *ſub modo*, *i. e.* that if he ſow it he ſhall pay thus much an acre for it; theſe covenants have been held to be void. *Sed quære* how the law is now, for it ſeems the ſtatute of 39 *Eliz. ch.* 2. is diſcontinued (1). If *A.* owe money to *B.* and *B.* owe money to *C.* and *B.* doth make a letter of atturney to *C.* to ſue *A.* at his own charge, and *B.* doth covenant with *C.* that he will not releaſe the debt to *A.* in this caſe albeit this be maintenance in *C.* to ſue at his own charge, yet this is a good covenant, and not againſt law. So alſo if a Dean and Chapter, or the like, covenant to renew a leaſe contrary to the meaning of the ſtatute of 18 *Eliz. ch.* 11. it ſeems this is a good covenant. And if the thing to be done by a covenant be in the nature of it impoſſible, the covenant is void. And therefore it is, that if a man covenant to go to *Rome* in three

See Condition Num. 7.

Againſt law.

See Conditions againſt law, Numb. 7. Dier 6.

18 Jac. B. R. Jolliffe verſus Broad. Paſ. 19 Jac. B R. Tanner verſus Brag.

* P. 164.

Hil. 20 Jac. Co. B. Maire verſus Stapleton.

Trin 14 Jac. Co. B. Taylor's caſe.

Impoſſible.

27 H. 8. 27. 4 H. 7. 4.

(1) This act was for "the maintenance of huſbandry and tillage." It enacted, that all land converted from tillage to paſture ſince the 17 *Nov.* 1 *Eliz.* having been uſed for tillage twelve years before the converſion, ſhould be reſtored to tillage before the 1ſt of *May* 1599.—The act is not inſerted in *Hawkins*, *Ruffhead's* or *Pickering's* edition of the ſtatutes, being marked to be *expired*, but it is contained in *Raſtell's*.—The preamble is curious, and not unworthy attention.—It recites *that the ſtrength and flouriſhing eſtate of this kingdom hath been always and is greatly upheld and advanced by the maintenance of the plough and tillage, being the occaſion of the increaſe and multiplying of people, both for ſervice in the wars, and in times of peace, being alſo a principal means that people are ſet on work, and thereby withdrawn from idleneſs, drunkenneſs, unlawful games, and all other lewd practices, and conditions of life; that by the ſame means of tillage and huſbandry, the greater parts of the ſubjects are preſerved from extreme poverty, in a competent eſtate of maintenance and means to live, and the wealth of the realm is kept diſperſed, and diſtributed in many hands, where it is more ready to anſwer all neceſſary charges, for the ſervice of the realm; and that huſbandry and tillage is a cauſe that the realm doth more ſtand upon itſelf, without depending upon foreign countries, either for bringing in of corn in time of ſcarcity, or for vent and utterance of our own commodities being in over great abundance.*

days, or the like; the covenant is void. So if a man covenant to make a feoffment to his wife; this covenant is void. But if a man covenant to make a good eſtate of land to her in fee ſimple, or otherwiſe, or to find her maintenance, or to give her ſo much by the year; theſe are good covenants. And generally, where the matter being in a condition will make the condition void becauſe it is againſt law; there it being in a covenant will make the covenant void (1).

See Condition Num. 7.

Dier 19. 115. If a leſſor covenant with his leſſee, that he ſhall and may have houſeboot, hayboot, plowboot, *&c.* by the aſſignment of the bailiff of the leſſor; this is a good covenant: and yet it ſeems it doth not reſtrain the power that the leſſee hath by the law to take theſe things without aſſignment. But if the leſſee do covenant that he will not cut any timber, or fuel, without the leave, or without the aſſignment of the leſſor; this is a a good covenant and doth reſtrain him; for in this and ſuch like caſes the rule is, *modus & conventio vincunt legem.*

Mich. 36. 37. Eliz. Co. B. Adjudged Deaux verſus Jefferies, 21 H. 7. 23. † Perk. Sect. 69. If an obligee covenant with the obligor, that he will not ſue him upon the obligation until Eaſter following; this is a good covenant, but no releaſe, or ſuſpenſion of the debt.

† If there be Lord and tenant of three acres of land, white acre, and two others, and the Lord grant to the tenant by deed that he will not diſtrain in white acre for his rent or ſervices; this is a good covenant, but doth not determine the ſeigniory.

Fitz. Covenant 5. If a man grant a mill within his manor, and covenant for him and his heirs, that there ſhall be no other mill ſet up within the manor; it ſeems this is a good covenant.

Fitz. Covenant 3. If one make a leaſe wherein are divers covenants to be performed on the part of the leſſee, and after the leſſee doth covenant, that if any of the covenants be broken, that the leſſor ſhall enter upon the land demiſed, and hold it until the leſſee make him * amends for the damage done by the breach of the covenant; it ſeems this is a good covenant, and that the leſſor may take advantage thereof accordingly. * P. 165.

Plow. 307, 308. 21 H. 7. 18. 27 H. 8. 16. Fincheſley 49. If a man, ſeiſed of land in fee, covenant to ſtand ſeiſed of it to uſes, and no eſtate doth riſe by the covenant; yet this may be good by way of covenant, and give remedy to the covenantee in an action of covenant. But with this difference. If the covenant be future, as where one doth covenant with another, that in conſideration of a marriage, his lands ſhall deſcend, remain, or revert to his ſon and heir apparent, and to the heirs of his body, on the body of his wife; in this caſe the covenantee may have a writ of covenant, upon the covenant. For if a covenant be preſent, as that a man and his heirs ſhall from henceforth ſtand and be ſeiſed to ſuch and ſuch uſes, and the uſes will not ariſe by the law in the caſe; in this caſe no action of covenant will lie upon this covenant: for this action will never lie upon any covenant, but upon ſuch a covenant, as is either to do a thing hereafter, or that a thing is or hath heretofore been done; and not when it is

(1) And therefore if a man on his marriage ſettles lands to himſelf for life, remainder to his intended wife for life, remainder to the heirs of his body on his wife to be begotten, remainder to his own right heirs, and in the ſame deed covenants not to ſuffer a recovery; that covenant will not reſtrain him; for he may afterwards by ſuffering a recovery veſt the land in himſelf in fee and deviſe it by will: for by the Ld. Chancellor the covenant does not bind the land ſo as to defeat the will or recovery, but the covenant will bind the aſſets of the ſettlor. 1 *Pr. Wms.* 104. *Collins* v. *Plummer.*

for a thing preſent, as when *A.* doth covenant with *B.* that his black horſe ſhall be for ever after the horſe of *B.* this is no good covenant to give the horſe to *B.* or to give him an action of covenant for him, but *A.* may keep him ſtill notwithſtanding (1).

If one mortgage upon condition to re-enter upon payment of an hundred pounds at a day, and the mortgagee doth covenant that he will not take the profits of the land until default of payment; this is a good covenant, and the mortgagee therefore may not meddle with the profits until the day of payment come. Agreed 8. Car.

5. What ſhall be ſaid a good covenant in law, upon which an action of covenant may be had: and what not.

If one make a leaſe for years of land by the words [demiſe or grant,] and there is not contained in the leaſe any expreſs covenant for the quiet enjoying of the land; in this caſe the law doth ſupply a covenant for the quiet enjoying of it againſt the leſſor, and all that come in under him by title, during the term; and upon this the leſſee, his executors, adminiſtrators, or aſſigns, may have an action of covenant if he be diſturbed (2). But where there is an expreſs covenant in the deed for the quiet enjoying of the land, there the law will not make this implied covenant. *Expreſſum facit ceſſare tacitum.* And therefore herein this is not like to the caſe, where a man doth make a leaſe for life by the words of *dedi & conceſſi*; or make a leaſe for life by other words reſerving rent; (in which caſes the law doth create a warranty againſt all men during the life of the leſſor); for if in theſe caſes there be an expreſs warranty in the deed, yet this doth not take away nor qualify the implied warranty; but the leſſee may make uſe of which of them he will, if he be ouſted or evicted by one that hath an elder title (3). Co. 4. 80. 5. 17. Trin. 3 Jac. B. R. Stile's caſe. Paſc. 7 Jac. B.R. Winſecombe's caſe. Warranty.

* P. 166.

6. How a covenant in deed or law ſhall be taken and expounded: and how it ſhall be performed.

* A covenant in particular (being one part of a deed) is ſubject to the general rules of expoſition of all parts of deeds in general, as: 1. To be always taken moſt ſtrongly againſt the covenantor and moſt in advantage of the covenantee (4). 2. To be taken according to the intent of the parties (5). 3. *Ut res magis valeat, &c.* 4. When no time is limited for the doing of the thing, it ſhall be done in reaſonable time, and the like (6). Plow. 287. See in Expoſition of Deeds before in toto.

Joint and ſeveral.

In caſes where the covenantees have, or are to have, ſeveral intereſts or eſtates, there, when the covenant is made to and with the covenantees, & *cum quolibet eorum, aut altero eorum*; in this caſe theſe words make the covenant ſeveral: as, if one by indenture demiſe black acre to *A.* and white acre to *B.* and green acre to *C.* and covenant with them and either of them, or covenant with them and every of them, that he is Co. 5. 19. Dier 338. Bro. Covenant 49.

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(1) In order to create a good covenant to ſtand ſeiſed to uſes, it is neceſſary that the covenantor ſhould be ſeiſed at the time of making the covenant; that the covenant ſhould be by deed, and not by parol; that it ſhould contain apt words, and a manifeſt intent; and that it ſhould be made on ſufficient conſideration, otherwiſe no uſe will ariſe. See fully poſt, in the chapter on Uſes.—*Com. Dig.* Covenant (G.) 1 *Wood* 647. *Vin. Abr.* Uſes (B. a.) (Z. a.)

(2) Accordingly *Cro. Jac.* 73. *Dier* 257. a. 2 *Leon* 104. See further as to action of covenant on the word *demiſe*. *Gilb.* Covenant 36. *Shep.* Law of Aſſur. 544.

(3) See further as to covenants created by implication of law, and in what caſes action of covenant may be had thereon, *Vin. Abr.* Covenant (G.) *Com. Dig.* Covenant (A. 4.) Garranty (A.)—*Bac. Abr.* Covenant (B.)

(4) As if *A.* covenants with *B.* that if *B.* marries his daughter he will pay him 20*l. per Annum*, without ſaying for how long, yet it ſhall be for the life of *B.* and not for one year only. 1 *Lev.* 102. See further *Bac. Abr.* Covenant (F.)

(5) See accordingly Sir *T. Raym.* 464.

(6) How a covenant ſhall be expounded with regard to the context, or to ſynonimous, or other words, See *Com. Dig.* Covenant (D.) *Vin. Abr.* Covenant (L. 4.)

lawful owner of all theſe acres; in this caſe the covenant is ſeveral: but if he demiſe to them the three acres together, and covenant in this manner; the covenant is joint and not ſeveral. And if *A.* and *B.* do covenant jointly, and ſeverally: in this caſe the covenant may be joint, or ſeveral, and the covenantors may be ſued either the one way, or the other, at the election of the covenantee (1).

F.N.B. 145. I. Dier 328. 26 H. 8. 3. For quiet enjoying.

If one make a leaſe of land to another, and covenant that he ſhall quietly enjoy it without the let of any perſon whatſoever, or without the let of any perſon whatſoever claiming by or under the leſſor; in both theſe caſes the covenant ſhall be taken to extend to ſuch perſons as have title, or claim ſome eſtate under the leſſor: for if in the firſt caſe any perſon that hath no title, and in the ſecond caſe any perſon that ſhall claim under another, and hath title, or that ſhall claim under the leſſor, claim, or enter, or otherwiſe diſturb the leſſee; this is held to be no breach of the covenant. *Sed quere* of the firſt caſe: for herein ſome conceive a difference between a covenant in deed, and a covenant in law: and that howſoever the covenant in law is extended only to evictions by title, yet that the covenant in deed ſhall be extended further. And therefore that if *A.* make a leaſe for years to *B.* and doth covenant that *B.* ſhall quietly enjoy it during the term without the interruption of any perſon or perſons; that if a ſtranger in this caſe that hath no right doth interrupt *B.* that he may have an action of covenant: as when ſuch a promiſe is by word, an action of the caſe will lie upon it (2).

Mich. 7 Jac. B. R. accord in Gamble's caſe.

Co. 4. 80. Dier 328. Per Furner at Lent Aſſiſe Glouc. 23 Car.

And if the leſſor covenant with his leſſee, that he hath not done any act to prejudice the leaſe, but that the leſſee ſhall enjoy it againſt all perſons; in this caſe theſe words [againſt all perſons] ſhall refer to the firſt, and be limited and reſtrained to any acts done by him, and no breach ſhall be allowed but in ſuch an act (3).

Curia Jervis verſus Peade. Mich. 40. 41 El. B. R.

The covenant in law upon the words, demiſe or grant, alſo for * the quiet enjoying of the thing demiſed, is general againſt all perſons that have title during the term, and extendeth to the heir after the death of the leſſor, as againſt himſelf only, and ſhall charge the executors or adminiſtrators for any diſturbance in the life of the covenantor, but not for any diſturbance afterwards; he that doth ſue therefore upon this covenant, muſt ſhew that he was moleſted or evicted by one that had an elder title.

Co. 5. 17. 22 H. 6. 52. Co. 4. 80. Dier 257.

* P. 167.

If one doth covenant to enter into bond for the quiet enjoying of land, and doth not ſay what bond; in this caſe it ſhall be taken to be a bond of ſo much as the land to be enjoyed is worth.

Co. 5. 78.

A warranty in a leaſe for years ſhall be taken for a covenant for quiet enjoying.

Fitz. Covenant 21. ſee before. 7 E. 4. 6. Bro. Grant. 164.

If one covenant with another to acquit him of all charges iſſuing out of the land, and after by parliament the tenth part

To free from incumbrances and charges.

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(1) Words, though never ſo joint, ſhall be taken ſeverally, where they have a diſtinct ſubject matter to work upon; *per Holt* Ch. J. 3 *Ch. Rep.* 126. See fully as to joint and ſeveral covenants, 1 *Wood* 357. *Gilbert* Covenant 99. *Bac. Abr.* Covenant (D.) and the caſe of *Enys* v. *Donnithorne*, 2 *Burr.* 1190.

(2) As to covenants for quiet enjoyment ſee poſt.—alſo *Vaugh.* 118. *Dyer* 328. a. *Gilb.* 187. *Vin. Abr.* Condition (U. a.) *pl.* 6. 7.—Covenant (Z.)

(3) For the conſtruction of the words in a covenant *notwithſtanding any act done by the covenantor*, &c. See *Vin. Abr.* Covenant (T.) *Cro. Jac.* 233. *Proctor* v. *Johnſon.*

of

of the value, out of the iſſues of all lands, are given to the King; in this caſe it ſeems the covenant ſhall not extend to this. But if the parliament had given the tenth part *exituum terræ*; the covenant would have extended to this as well as to rents, commons, and ſuch like things, wherewith the land is charged.

To make aſſurances of land.

If *A.* covenant with *B.* to make ſuch aſſurance, or ſuch further aſſurance of land as the counſel learned in the law of *B.* ſhall adviſe; in this caſe albeit *B.* be learned in the law himſelf, yet he may not deviſe this aſſurance, but ſome other learned in the law muſt adviſe, otherwiſe *A.* is not bound to make it (1). Co. 5. 19.

And if *A.* covenant with *B.* to make ſuch aſſurance of land by a day, as *B.* or his heirs ſhall deviſe; in this caſe *B.* or his heirs muſt firſt deviſe the aſſurance, before *A.* is bound to do any thing. And therefore if one ſell land for money, and the vendee doth covenant to make back to the vendor and his heirs, ſuch aſſurance of the land as the counſel of the vendor ſhall deviſe, within one year, provided that if the vendee make default in the aſſurance, then if he do not pay twenty pounds to the vendor, that then the vendee ſhall ſtand ſeiſed to the uſe of him and his heirs; and the vendor tender no aſſurance, and the twenty pounds is not paid; in this caſe the land is in the vendee freed from the covenant. And therefore in theſe and ſuch like caſes, where a man is to make ſuch aſſurance, as *A.* or his heirs, or their counſel ſhall deviſe; *A.* or his heirs muſt take care that in time they have an aſſurance reaſonably drawn and ready to be ſealed, and to tender it to him that is to ſeal it, for until then there can be no breach of covenant. But if *A.* be bound to make a feoffment, leaſe, or other aſſurance of land to *B.* by a day; in this caſe *B.* need not to demand it or tender the aſſurance, for *A.* at his peril muſt do it, otherwiſe he doth break his covenant. Co. 5. 19, 20. Dier 361. & per Juſt. Bridgeman.

[a] And yet if in this caſe *B.* do get the aſſurance drawn, and tender it to *A.* it ſeems *A.* is bound to ſeal it, or * otherwiſe he doth break his covenant. [a] Trin. 20 Jac. B. R. Steed verſus Spike.

* P. 168.

† And if the caſe be ſo that *A.* is bound to make ſuch aſſurance to *B.* by a day, at the coſts of *B.* in this caſe *A.* muſt do the firſt act, *viz.* notify to *B.* what manner of aſſurance he will make, that he may know what money to tender; and when the money is tendred, *A.* muſt ſee that he do make the aſſurance accordingly at his peril; and if he fail in either of theſe, the covenant is broken. † Co. 5. 20. 22.

If *A.* be bound to make ſuch aſſurance to *B.* as by the counſel learned of *B.* upon requeſt made ſhall be deviſed; in this caſe it is ſufficient if the advice be given to *B.* and that he do make it known to *A.* and it is not needful it be given to *A.* immediately. And if *A.* covenant with *B.* to make ſuch aſſurance to *B.* as *I. S.* ſhall deviſe, and *I. S.* doth deviſe a reaſonable deed of bargain and ſale, and he tender it to *A.* to ſeal; in this caſe *A.* is bound to ſeal it preſently, and he ſhall not have time to adviſe with his counſel upon the deed; but if he be illiterate and cannot read the deed, he may refuſe and delay to ſeal it until he can get ſome body to read it, which he Co. 5. 20. Dier 338. Co. 2. 3.

(1) As to covenants to make ſuch aſſurance as counſel ſhall adviſe; to make aſſurance generally; and for further aſſurance, ſee fully in *Vin. Abr.* Covenant (W.) (G. a.) 1 *Wood* 417. *Gilb.* Covenant 209. 226. *Cro. Jac.* 251.

Experientia. must do as ſoon as he can. And if one be bound by covenant to make an aſſurance upon requeſt: the covenantee muſt requeſt, and tender an aſſurance alſo, and he muſt tender ſuch a one alſo as is reaſonable, otherwiſe the covenant will not be broken by the refuſal or neglect to do it: as if one be bound to make a feoffment to *A.* upon requeſt; in this caſe *A.* muſt get a naked deed of feoffment drawn without warranty or covenants, and tender it. And if the covenant be to make ſuch a leaſe as the former; in this caſe the ſecond leaſe muſt not differ from the former, and if it do, the party is not bound to ſeal it.

Curia Hil. 7 Jac. Co. B. If one covenant to levy a fine at the next aſſiſes for thirteen years *extunc*; this ſhall be taken from the time of the fine levied, and not from the time of the covenant.

Adjudged in Sir Jo. Brets caſe. If one bargain and ſell land to me by deed indented, and before the inrolment of the deed I do covenant with *I. S.* to convey all the land whereof I am ſeiſed, and to do this before ſuch a day, and before the day the deed is inrolled; in this caſe, my covenant ſhall not extend to this land conveyed to me by this bargain and ſale.

Dier 371. If *A.* covenant with *B.* that in conſideration of a marriage between the ſon of *A.* and ſiſter of *B.* that he, at the coſts of his ſon, and by his ſufficient deed, will before Eaſter day aſſure land to his ſon, and *B.* doth covenant that if *A.* do perform this, then he will make him a general releaſe; in this caſe, albeit *A.* be ready, if the ſon do not tender the aſſurance, and the conveyance is not made, *B.* is not bound to make any releaſe.

Fitz. Covenant 4. If one covenant to keep and leave a houſe in the ſame, or as good plight, as it was at the time of the making of the leaſe; in this caſe the ordinary and natural decay of it is no breach of the covenant; but the covenantor is hereby bound to do his beſt to keep it in the ſame plight, and therefore to keep it covered, *&c* (1). To repair the houſe. * P. 169.

Dier 9. If the words of a covenant be [that the leſſee ſhall have thorns by the aſſignment of the leſſor, and neceſſary fuel alſo;] it ſeems by this, that there muſt be an aſſignment of the fuel as well as of the thorns. For the having of houſeboot. &c.

Dier 19, 20. If the leſſor covenant with his leſſee, that he ſhall have ſufficient hedgeboot by aſſignment of the bailiff of the leſſor; in this caſe and by this, the leſſee is not reſtrained from that liberty that the law doth give him, and therefore that he may take without aſſignment: but if the words be negative, that he ſhall not take without aſſignment, or that he ſhall take by aſſignment, and not otherwiſe, *contra* (2).

Trin. 21 Jac. B R. George verſus Lane. If *A.* doth covenant with *B.* that whereas a marriage is intended to be ſolemnized between *A.* and *C.* the daughter of *B.* at or before the fourteenth day of *Auguſt* next, and whereas the ſaid *B.* hath paid to the ſaid *A.* a thouſand pounds for portion, *&c.* the ſaid *A.* in conſideration thereof, doth covenant with *B.* that he, within one year of the day of the marriage, will aſſure lands of the value of four hundred pounds *per* To convey lands of the value of, &c.

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(1) See accordingly and further, in *Gilb.* Covenants 149. See more amply how covenants to repair ſhall be expounded, poſt.—Alſo *Finch Rep.* 86. *Lant* v. *Norris*, 1 *Burr.* 287. 1 *Wilſ. Rep. pt.* 1. *p.* 75.

(2) See accordingly *Sherewood* v. *Nonnes's* caſe, 1 *Leon.* 250.

Annum; in this caſe albeit the marriage be not on or before that day, yet the covenant muſt be performed (1).

That thel eſſee ſhall make eſtates.

If one make a leaſe for years of a manor, and covenant that the leſſee ſhall make eſtates for life or years, and that they ſhall be good; in this caſe, it ſeems this covenant ſhall not be taken to enable the leſſee to make eſtates for a longer time than his eſtate will bear. Per Juſtice Bridgman.

That if the leſſee ſell, the leſſor ſhall have the firſt refuſal.

If the leſſee covenant with the leſſor, that if the leſſee be minded to ſell his eſtate, the leſſor ſhall have the firſt refuſal; in this caſe when the leſſee is minded to ſell, he need do no more but acquaint the leſſor with his purpoſe, and know his mind, and if he do not anſwer him preſently, he may ſell it to whom he will: and if the covenant be further, that the leſſor ſhall give as much as another will, the leſſee muſt tell him what another doth offer him, and aſk him whether he will give ſo much, and if he refuſe, or do not accept it preſently, the leſſee may ſell to whom he will. Dier 13.

To do one thing for another.

If one covenant to ſerve me a year, and I covenant to pay him ten pounds for it; in this caſe albeit he do not ſerve me, yet I muſt pay him the ten pounds. But if I covenant with him to pay him ten pounds if he ſerve me a year, *contra*, for in this caſe I am not bound to pay him the money unleſs he ſerve me a year. So if one covenant to make new pales ſo as he may have the old, in this caſe it ſeems he is not bound to make the new pales unleſs he may have the old pales. So if one covenant to pay money for ſervice, counſel, or the like, or covenant to marry one's daughter, or make an eſtate, and the covenant is penned conditionally, and * ſo as one thing is the cauſe of another, and it is not ſet down by mutual and reciprocal covenants; in all theſe caſes, if the cauſe, or condition, be not obſerved, the covenant ſhall not be performed. Co. ſuper Lit. 204. Dier. 371. Mich. 7 Jac. Co. B.

* P. 170.

That the leſſee ſhall have the fee.

If one make a leaſe for ten years, and covenant that if the leſſee pay him ten pounds within the ten years that he ſhall have the fee ſimple, and the leſſee ſurrender his eſtate within the time; in this caſe, if the leſſee pay the money, the leſſor is bound to make the fee ſimple to him. But if the words of the covenant be, that if he pay him ten pounds within the term, he ſhall have the fee, and the leſſee ſurrender his term, and then pay the ten pounds; in this caſe the leſſor is not bound to make the fee ſimple, for it was not paid within the term. Co. 1. 144.

Aſſignes.

If one covenant to do a thing to *I. S.* or his aſſigns, or to *I. S.* and his aſſigns by a day, and before the day *I. S.* die; in this caſe it muſt be done to his aſſigns if he before the day name any aſſignee, and if he do not, it muſt be done to his executor or adminiſtrator which is an aſſignee in law. See more in *condition numb.* 8. *obligation*, 7. 27 H. 8. 2.

7. When a covenant in deed or law ſhall be ſaid to be broken: and when not: and how.

If one be ſeiſed of land in fee, or poſſeſſed of a term of years, and he doth alien it, and ſuppoſing he hath a good eſtate, he doth covenant that he is lawfully ſeiſed or poſſeſſed, or that he hath a good eſtate, or that he is able to make ſuch an alienation, *&c.* and in truth he hath not, but ſome other hath an eſtate in it before; in this caſe the covenant is broken as Dier 303. Co. 9. 60.

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(1) As to covenants to convey lands of ſuch a value; or that they are, or ſhall be, of ſuch a value; ſee fully in 1 Ld. *Raym.* 365. *Cro. El.* 43. 1 *Rol. Abr.* 429. and the caſe of *Langton* v. *North*, 2 *Chanc. Rep.* 140.

ſoon

Adjudged Sir Perall Brocas caſe. 32. Q.

ſoon as it is made (1). And if I bargain and ſell land, by deed indented, to *B.* and before the deed is inrolled, I grant the ſame land to *C.* and covenant that I am ſeiſed of a good eſtate of it in fee, and after the deed is inrolled; in this caſe the covenant is broken (2).

That the covenantor is ſeiſed of a good eſtate, &c.

Mich. 8 Jac. Lams caſe. Dier 328. F.N.B. 145. 26 H. 8. 3. Hil. 39 Eliz. B.R. Cornes caſe. Fitz. Covenant 26. Bro. Covenant. 40.

If *A.* let land to *B.* and covenant that he ſhall quietly enjoy it without the let of any perſon whatſoever, and *A.* himſelf, or any other perſon that hath any title to the land by or under him, as if he make a leaſe of it, or grant a rent out of it to another, or any other perſon that hath any title to the land, albeit it be not by or under *A.* as if *A.* were a diſſeiſor, and the diſſeiſee do enter or diſturb *B.* in all theſe caſes the covenant is broken (3). And ſo alſo is the law deemed to be by ſome in caſe of covenant in deed for quiet enjoying, where a ſtranger or one that hath no title to the land doth enter or diſturb *B.* But otherwiſe it is in caſe of covenant in law for quiet enjoying; for in this caſe if a ſtranger that hath no title to the land doth enter or diſturb the leſſee, this is no breach of the covenant in law. And in all caſes where any perſon hath title, the covenant is not broken until ſome entry or other actual diſturbance be made by him upon his title.

For quiet enjoying.

20 Jac. Bro. Covenant 7.

If a man make a leaſe of land, and after make a feoffment of * the ſame land, and the feoffee doth diſturb the leſſee; in this caſe it hath been ſaid this is a breach of the covenant for quiet enjoying. *Sed quere.*

* P. 171.

Hil. 20 Jac. adjudgd B.R. Butler verſus Lady Swinerton.

If a man purchaſe land to him and his wife and his heirs in fee, and then make a leaſe for years of it to *I. S.* and covenant for him, his executors and aſſigns, that the leſſee, his executors and aſſigns, ſhall quietly hold and enjoy the premiſſes without the let of the leſſor, his heirs or aſſigns, or any other perſon by or through his or their means, title or procurement, and after the leſſor doth die, and his wife doth enter and diſturb; in this caſe and by this means the covenant is broken (4). And ſo it is alſo, if *A.* purchaſe land of *B.* to have and to hold to *A.* for life, the remainder to *C.* the ſon of *A.* in tail, and after *A.* doth make a leaſe of this land to *D.* for years, and doth covenant for the quiet enjoying as in the laſt caſe, and then he dieth, and then *C.* doth ouſt the leſſee; in this caſe this was held to be no breach of the covenant. So likewiſe if *A.* be ſeiſed of white acre in fee, and take to wife *B.* and then make a leaſe of it to *C.* with ſuch a covenant as before for the quiet enjoying, and then *A.* doth die, and after *B.* doth recover dower; by this the covenant is broken, and yet if the mother of *A.* recover dower and ouſt the leſſee, *contra.* So

Swans caſe. M. 7 & 8 El.

Dier 42. 26 H. 8. 3. Fitz. Covenant 6. 26.

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(1) And if two men upon ſale of their wives lands covenant that they and their wives have good right to convey; if one of the women is under age, it is a breach, for ſhe hath not the power to convey according to the covenant. *Naſh* v. *Aſhton*, Sir *T. Jones* 195.

(2) See more fully as to covenant that grantor is ſeiſed in fee, *&c. Vin. Abr.* Covenant (Y.) Parols (D.) *pl.* 4. *Cro. Jac.* 369. 3 *Lev.* 46.

(3) Leſſor covenanted that leſſee *paying* the rent and *performing* the covenants ſhould quietly enjoy. The breach aſſigned was a diſturbance by the leſſor, who pleaded that till ſuch a time the plaintiff did quietly enjoy, but then he cut down wood, which was contrary to his covenant, and then, and not before, defendant entered, and ſo by plaintiffs not performing his covenant, the defendants covenant ceaſes to oblige him; whereunto plaintiff demurred.—The queſtion was whether the defendants covenant was conditional or not? Judgment was given for the plaintiff that the covenant was not conditional. *Hays* v. *Bickerſtaffe*, 2 *Mod.* 35. See further in page 163. before.

(4) For ſhe claims by the means of the baron, and ſhe is therefore within the covenant, *Cro. Jac.* 657. *Palm.* 339. S. C.

alſo

alſo if a tenant in tail doth make a leaſe with ſuch a covenant, and his iſſue doth diſturb the leſſee; this is no breach of the covenant. And yet if the leſſor be the cauſe of the gift in tail, or procure the diſturbance, this may be a breach of the covenant. And ſo alſo it is where a man is ſeiſed of land in fee, and he doth make a leaſe with ſuch a covenant, and afterwards he doth die, and then his heir is in ward by reaſon of a tenure, and hereby the leſſee is diſturbed; it ſeems this is no breach of this covenant.

If one covenant that the wife he is about to marry ſhall quietly enjoy all her goods, and that the covenantee ſhall take it into his poſſeſſion, and the huſband doth only take the goods and keep them in his poſſeſſion; this is no breach of the covenant. Curia. B. R. Paſc. 6. Car. Crowles caſe.

If a covenant be for the quiet enjoying againſt all perſons but the King and his ſucceſſors; and the patentee of the king do diſturb; this is a breach of this covenant. Adjudged Hil. 38 El. Woodroffe verſus Greenwood.

If two make a leaſe, and covenant that the leſſee ſhall enjoy the land without the let of them or any other, and one of them alone doth diſturb the leſſee; this is a breach of the covenant. Adjudged Mich. 2 Car. B. R. Sanders caſe. Dier 240.

If a leſſee grant and aſſign all the land contained in his leaſe to *A.* and doth covenant with him that he hath not done any act or thing by which the grant or aſſignment might be impaired, but that the aſſignee his executors, *&c.* may enjoy it againſt all perſons, and before this time the wife of the leſſor had recovered and had execution of a third part of this land for her dower; in this caſe this, * is no breach of the covenant, for the words [but that, *&c.*] do refer to the former, and are not abſolute. * P. 172.

If *A.* grant the bailiwick of *W.* to *B.* for life, and *B.* aſſign it to *C.* for three years, and after to *D.* and *C.* doth covenant with *D.* that he will not do, or ſuffer to be done, any act during the ſaid three years by which the grant made by *A.* may be forfeit, but that after the three years ended he may enjoy it in as ample manner as *C.* did, or might have done, without any act by *C.* and after the three years ended, *C.* doth execute a proceſs there, and thereby incroach upon the office; this is no breach of the covenant. Adjudged Rich verſus Row. Paſch. 13 Jac. Co. B.

To free from charges and incumbrances.

If *A.* grant land to *B.* and his heirs rendring ten pounds rent, and *B.* doth ſell the land to *C.* and his heirs, and doth covenant with *C.* that from ſuch a day he ſhall enjoy it diſcharged of all incumbrances, and before that day a common recovery is had againſt *C.* in which *A.* is vouched, and this is to the uſe of *C.* and his heirs, ſuppoſing hereby the rent had been gone which is not ſo; in this caſe the covenant is broken, for this rent is an incumbrance. Curia Hil. 20 Jac. Co. B. Greenway & Tuckfald's caſe.

If a leaſe be made of land for years, and the leſſee deviſe it to his wife *durante viduitate*, and after to his ſon, and he in reverſion doth ſell the fee to the woman during the widowhood, and doth covenant that the land is diſcharged of all former ſales, rights, titles, charges: in this caſe the covenant is broken at the firſt by reaſon of the poſſibility of the ſon (1). Co. 10. 52.

(1) And in action of debt on bond for performance of the covenants in the leaſe, brought by the adminiſtrator of the widow, againſt the adminiſtrator of the reverſioner the grantor,—Judgment was for the plaintiff. See this caſe as ſtated by the Ch. J. in 10 *Co.* 52. and the points reſolved therein.

If

9 Eliz. Co. B. If *A.* grant white acre to *B.* and covenant that *B.* ſhall enjoy it againſt all incumbrances, and *C.* doth diſturb him in the taking of common there, and this is a common which is againſt common right, and which he hath by preſcription: in this caſe it ſeems this is a breach of the covenant. But if it be of a common, that is of common right, *contra* (1).

Dier 139. If *A.* covenant with *B.* before Eaſter to make him a good ſure eſtate of land, diſcharged of all former bargains, leaſes and incumbrances whatſoever, (leaſes or grants for life, or years, reſerving the ancient rent, during the term, only excepted) and *A.* after this, and before the eſtate made, doth make a grant of all or part of the land reſerving the old rent, it ſeems this is no breach of the covenant. To make eſtates and aſſurances.

Co. 5. 21. If one make a leaſe to *I. S.* for years, and covenant with him that upon the ſurrender of that leaſe he will make him a new leaſe, and the leſſor, before *I. S.* can make any ſurrender, doth ſell away the reverſion, or make a leaſe to another of the land, and ſo diſable himſelf, this is *ipſo facto* a breach of the covenant, without any ſurrender made by the leſſee, which in this caſe is not needful. For *Lex neminem cogit ad vana & in utilia peragenda.* So if one be ſeiſed of land in fee, and covenant to make a feoffment of it to *I. S.* by * a day upon requeſt, and the covenantor before the day doth make a feoffment of it to another, and then doth die before any requeſt made to him; in this caſe the covenant is broken. * P. 173.

Dier 338. Co. 2. 3. If *A.* covenant with *B.* to make ſuch aſſurance as *B.* or as the counſel learned of *B.* ſhall deviſe, and *B.* tender ſuch an aſſurance to *A.* to ſeal, and *A.* doth refuſe or delay to ſeal it; this is a breach of the covenant.

Bro. Covenant 3. If *A.* doth covenant with *B. C. D.* and *E.* to make them a feoffment ſuch a day, and they come to the land at the time to take it, and *A.* doth not make the feoffment; by this the covenant is broken. And ſo alſo if *B.* and *C.* only, or one of them, doth come to the land; for it may be made to any of them in the name of the reſt. But if none of them come to the land, albeit the feoffor never come, there it ſeems the covenant is not broken.

Curia B. R. If *A.* covenant with *B.* before Eaſter next, to aſſure his houſe to him and *K.* his wife, during the life of *I. S.* and *A.* ſurrender his houſe to the uſe of *B.* and ſuch perſon as *K.* ſhall name, at the requeſt of *B.* in this caſe the covenant is broken, for this is no performance of it.

Dier 324. If one covenant to repair, ſuſtain and amend a houſe, and the houſe is burnt by the negligence of the covenantor and not repaired again; this is a breach of this covenant (2). And if the leſſee covenant for him and his executors to repair at his own coſts, (the principal timber, not hurt, nor in decay for lack of reparations or otherwiſe in default of the leſſee or his executors only except) and he die, and afterwards the houſe is burnt in default of the executors; in this caſe the covenant is broken and the executors may be charged (3). To repair.

Fitz. Covenant 29. Co. 5. 15. F.N.B. 145. Co. 1. 98. Perk. Sect. 738. Dier 33 Plow. 29. 40 E. 3. 5. If one covenant to leave a wood in the ſame plight he finds it, and he cut down trees; in this caſe the covenant is broken

(1) See further as to covenants free from incumbrances, in *Vin. Abr.* Covenant (A. a.) 1 *Wood* 415. *Gilb.* Covenant, *ch.* 31.

(2) In the caſe of *Compton* v. *Allen.* *Sti.* 162. *Roll. Ch. J.* ſaid, "That a leſſee that covenanteth to repair, "ought to do it if the houſe be burnt, *be it by negligence, or by other means.*" See further on this point, in the caſe of the Earl of *Cheſterfield* v. Duke of *Bolton.* *Comyns Rep.* 627.

(3) *De bonis teſtatoris tantum.* See Dyer 324. b.

preſently, for it is now become impoſſible to be performed by his own act: but if in this caſe ſome of the trees be blowed down with the wind, or the like, by this the covenant is not broken, for it is now become impoſſible to be done by the act of God, and in this caſe the covenantor is not bound to ſupply it (1). And ſo likewiſe of a covenant to repair houſes, or if one covenant to ſuſtain houſes, or ſea banks, or covenant to leave them in as good caſe as one doth find them, and the houſes be burnt, or thrown down by tempeſt, or the like, or the banks be overthrown by a ſudden flood, or the like accident; in this caſe the covenant is not broken by this accident only; but if the covenantor doth not repair and make up theſe things again in time convenient, the covenant will be broken. And if houſes be let to me for years, and I covenant to leave them in as good plight as I find them, and I throw down the houſes, this is no breach of the covenant for I may re-edify them, * and therefore no action will lie upon this covenant until the end of the term.

* P. 174.

If one covenant to repair a houſe before a day, and it happen the plague is in the houſe before and until the day; and thereby it is not done; in this caſe the covenant is not broken, for this will excuſe; but then it muſt be done in convenient time afterwards, for otherwiſe the covenant will be broken. Hil. 8 Jac. Cur a.

If a leſſee covenant to do all the reparations of a houſe demiſed, at his own coſts and charges, and he cut trees upon ſome of the ground demiſed to amend the houſe; it ſeems this is a breach of his covenant (2). Dier 198.

To pay money. If one covenant to pay money at five ſeveral days, and he fail of payment the firſt day; by this the covenant is broken (3). Co. ſuper Lit. 292.

To leave a ſtock. &c. If one take land ſowed or a ſtock of cattle in leaſe for years, and the leſſee covenant to leave it in as good plight as he doth take it; in this caſe he muſt leave it ſowed again, and if any of the cattle die, he muſt make up the number, otherwiſe he doth break his covenant. 40 E. 3. 5.

Not to take toll. If a corporation do covenant not to take toll, and their common officer appointed for that purpoſe doth take it; this is a breach of the covenant. 43 E. 3. 17.

To build a houſe. If *A.* covenant with *B.* to build a houſe by a day, and *B.* doth forbid him, and thereupon he doth forbear to do it, and doth it not; in this caſe the covenant is broken, for this will not excuſe him: But if he do by any actual impediment hinder him, or be the cauſe why the thing is not done, then the not doing of it is no breach of the covenant. And therefore if a leſſee covenant to cleanſe one of the ditches in the land demiſed, 18. E. 4. 8. Kelw. 34. Trin. 36 El. B. R. Carrell verſus Reade.

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(1) Many parts of the *Touchſtone* have been ſelected by ſubſequent writers; but it is rather ſingular that the paſſages in the text ſhould be repeated in 1 *Wood* 397 and in 399. in *Gilb.* Covenants 150 and in 473, tho' this book is not referred to in either of thoſe places.

(2) As to the extent and conſtruction of covenants to repair, in addition to the references before in page 165. note 1, ſee *Vin. Abr.* Covenant (L. 5.)

(3) An action of *covenant* lies upon the firſt default, but an action of *debt* will not lie till the laſt. See 3 *Co.* 22. a. In *Co. Lit.* 292. b. a diſtinction is taken between a debt due by contract or bond, and a debt due by recognizance, for if a recognizance be to pay money at five ſeveral days, after the firſt day of payment, (and default) execution may be taken on the recognizance for the whole ſum, it being in the nature of ſeveral judgments; but no action of debt will lie on the bond or contract, before the laſt day be paſt.—See further as to covenants for payment of money. *Stiles* 59. 172. A covenant to pay money which is by deed cannot be diſcharged without deed. See *Rogers* v. *Payne*, 1 *Wilſ. pt.* 2. *p.* 376.

and the leſſor enter upon the land itſelf and keep out the leſſee, and he doth not cleanſe the ditch by the time; by this the covenant is broken: but if in this caſe the leſſor do by force keep the leſſee out of the ditch or place itſelf, *contra*. To cleanſe a ditch.

Hil. 16 Jac. B. R. Billiard verſus Loe. If *A.* and *B.* be jointenants of a ſhop, and *A.* covenant with *B.* that he and his aſſigns ſhall have free ingreſs and egreſs in and out of the ſhop, and *A.* doth appoint *C.* his ſervant to enter as ſervant to him and to occupy in common with *A.* and this ſervant doth expel the ſervant of *B*; in this caſe, this is a breach of the covenant. To have liberty to go in and out of a ſhop.

3 H. 4. 8. If *A.* covenant with *B.* that *B.* ſhall come four times a year into the houſe of *A.* without being ouſted by *A.* and *A.* when he doth ſee *B.* coming, doth ſhut the doors and windows, and doth not ſuffer *B.* to come in; by this the covenant is not broken. To come into a houſe.

33 H. 6. 16. Bro. Covenant 3. Fitz. Barre 62. If *A.* covenant with *B.* to marry the daughter of *B.* make a feoffment, or do any other act to *C.* (who is a ſtranger to the covenant) and *A.* doth tender it and offer to do as much as doth lie * in his power, but the ſtranger doth refuſe it, and thereby it is not done; yet this doth not excuſe, but the covenant is broken. But if the covenant be to do any ſuch act to the covenantee himſelf, and the covenantor tender it and the covenantee refuſe it; by this the covenant is performed (1). To marry another. Make a feoffment, &c. Tender and refuſal, * P. 175.

Mic. 7 Jac. Co. B. See more in the laſt queſtion, and in *obligation numb.* 7, 8, 9, and in *condition numb.* 9, 10.

Any one that is party to the deed to whom the covenant is made, may take advantage of the covenant, but not a ſtranger; for if *A.* covenant with *B.* to do an act to *C.* who is no party to the deed, and he doth it not, *B.* and not *C.* muſt ſue him upon this breach. 8. Who ſhall or may have advantage of a covenant in deed or law, and bring a writ of covenant upon the breach of it: or not.

Co. 5. 17. Dier 257. 47 E. 3. 12. If a leaſe be made of land to a huſband and wife for years, and the leſſor doth enter upon the land and put them both out, or the one of them after the death of the other, in this caſe both of them whilſt they both live, and the ſurvivor, after the death of one of them, may have this action of covenant upon the covenant in law. So if a wardſhip be granted to a woman by deed, and ſhe take a huſband and die; the huſband ſhall have advantage of this covenant in law made by the word [grant] if he be diſturbed. So if one by the words [demiſe or grant] leaſe land to a woman ſole for years, who taketh a huſband and dieth; in this caſe if the huſband be diſturbed he ſhall take advantage of this covenant in law.

Dier 338. If a feoffment be made in fee, and the feoffor doth covenant to warrant the land, or otherwiſe, to the feoffee and his heirs; in this caſe the heir of the feoffee ſhall take advantage of this (2). As if *A.* covenant with *B.* and his heirs, to infeoff *B.* and his heirs of land, and *B.* die before it be done, in this caſe his heirs ſhall take advantage thereof. And if *A. B.* and *C.* have lands in coparcenery, and they purchaſe other lands in fee, and they covenant each to other his heirs and aſſigns, to make ſuch conveyance to the heir of him that ſhall Heir.

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(1) See more amply what ſhall be deemed a breach or performance of a covenant, *Com. Dig.* Covenant (E) *Vin. Abr.* Covenant (L. 7.) *Gilb.* Covenants 184. *Bac. Abr.* Covenant (H.)—In what caſes, and how, a court of equity will decree a performance of a covenant, ſee *Com. Dig.* Chancery (2 X.)

(2) And where the covenant relates to the inheritance, and is ſuch as runs with the land, though the covenant be with the leſſor his executors and adminiſtrators, without naming the heir, yet the heir ſhall have an action of covenant for breach. 2 *Lev.* 92, *Lougher* v. *Williams.*

die

die firſt, of a third part, as he ſhall deviſe, in this caſe the heir, not the executor, ſhall take advantage of the covenant.

Executors and adminiſtrators.

Executors and adminiſtrators ſhall take advantage of inherent covenants, albeit they be not named (1). And therefore if *A.* covenant to do a thing to *B.* and do not name his executors or adminiſtrators, and it be not done, it ſeems the executors or adminiſtrators of *B.* may have an action of covenant for the not doing of it. As if one covenant with *I. S.* to pay him money at Michaelmas and do not ſay to his executors, *&c.* and he die before the time; in this caſe his executor or adminiſtrator ſhall take advantage of this covenant and may recover the money. Co. 5. 17. F.N.B. 145. H. Dier 118. 271.

Aſſignee or grantees.

Grantees of reverſions ſhall have the like advantage againſt fermors (by action only) for any covenant or agreement contained * in their leaſe, as the leſſors, their heirs or ſucceſſors might. And ſo alſo ſhall leſſees againſt grantees of reverſions (recoveries in value excepted) by the ſtatute of 32 *H.* 8. *cap.* 34. And herein (as in the caſe of a condition before) a difference is taken between covenants that are inherent, and covenants that are collateral. For the covenants whereof grantees by this ſtatute ſhall take advantage are inherent covenants, *i. e.* ſuch covenants as do concern the thing granted and tend to the ſupportation of it: as where a leſſee for life or years doth covenant with his heirs to keep the houſes demiſed in good reparations, or the like, and after the leſſor doth grant away the reverſion of all, or part of the houſes to *I. S.* in this caſe, *I. S.* ſhall take advantage for any breach of the covenant in his time, but not for any breach before the time the reverſion was granted. But if the leſſee doth covenant with his leſſor and his heirs to pay him a ſum of money, or make him a feoffment or the like, and then the leſſor doth grant the reverſion to *I. S.* in this caſe *I. S.* ſhall not take advantage of this covenant: and yet the executors or adminiſtrators of the leſſor ſhall take advantage of this covenant (2).

* P. 176.

See Condition. Numb. 12. Co. 5. 18. 9 Jac. B. R. Wilborne & Beſtwich's caſe accord. Mich. 8 Jac. Pime's caſe.

Regularly every aſſignee of the land or thing demiſed ſhall take advantage of inherent covenants; as if a covenant be, to have eſtovers to burn in the houſe demiſed, or to have timber to repair, or if the covenant be that the leſſor or leſſee ſhall repair, or the like. And therefore of theſe aſſignees in deed, and in law, aſſignees of aſſignees *in infinitum* ſhall take advantage, and aſſignees of executors or adminiſtrators, tenants by ſtatute, or elegit, or after a ſale upon a *fieri facias*, a huſband in the right of his wife; any one of theſe, and any other that ſhall come lawfully to a term unto which ſuch a covenant is incident, albeit he be not named, yet may he take advantage of it (3). Co. 5. 17.

If a leaſe for years be made to *I. S.* by the words [demiſe or grant] and the leſſee aſſign this over to *I. D.* in this caſe *I. D.* may take advantage of the covenant in law, and bring an action againſt the leſſor if he be diſturbed. Co. 4. 80. Dier 257. Fitz. Covenant 30.

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(1) Executor, although he is not named, yet ſhall have an action of covenant in all caſes by the common law, becauſe he is privy and quodammodo party, becauſe he repreſents the perſon of the teſtator more than the heir, *Co. Lit.* 208. 209. a. ſee further in *Gilb.* Law of Covenants 322.

(2) The reader will find the operation of the ſtatute of 32 *H.* 8. *c.* 34. (which forms a material part of the doctrine of covenants) and to what perſons it extends, clearly explained, and well ſupported by authorities, in *Bac. Abr.* Covenant (E. 6.) and in *Vin. Abr.* Covenant (K. 3.)

(3) See *Moor* 242. *Godb.* 270. *Prec.* in Chan. 39.

If

Co. 3. 63. F.N.B. 145. If a leaſe for years be made of land, and the leſſor doth covenant with the leſſee and his aſſigns to do, or not to do, ſomething; in this caſe an aſſignee by word, or an aſſignee by deed, may take advantage of this covenant (1).

Co. ſuper Lit. 385. Co. 5. 23. 18. If two coparceners make partition of land, and the one of them doth covenant with the other to acquit her and her heirs of a ſuit that iſſued out of the land, and the covenantee doth alien her part to a ſtranger; in this caſe the alienee ſhall have the ſame advantage for acquital of the land, as the covenantee had. So if *A.* be ſeiſed of the manor of *B.* whereof a chapel is parcel, and a prior with the conſent of his convent had covenanted with *A.* and his heirs * Lords of the manor to celebrate divine ſervice in the chapel, and after *A.* had ſold the manor; in this caſe the vendee or aſſignee of the manor, ſhould have had the ſame advantage of the covenant the vendor had. But if the Lord had ſold the chapel, the aſſignee of the chapel ſhould not have taken advantage of the covenant. And if a covenant be to ſay divine ſervice in the chapel of a ſtranger; in this caſe the aſſignee of the manor in which the chapel is, ſhall not take advantage of the covenant (2). * P. 177.

Co. 5. 16. 17, 18. Regularly all thoſe that do ſeal and deliver the deed, and are named and bound by the expreſs words of the covenant, whether the covenant be collateral or inherent, are bound by the covenant contained in the deed; and therefore if heirs, executors, adminiſtrators or aſſigns be named in the covenant, for the moſt part they are bound by the covenant. And in all caſes of inherent covenants alſo, where a man doth covenant for himſelf only, and doth not name his executors and adminiſtrators or either of them; they are bound and may be charged by the covenant notwithſtanding. And in ſome caſes the law is ſo alſo for collateral covenants. And in moſt caſes of inherent covenants that tend to the ſupport of the thing granted; (in reſpect of which it is preſumed the leſſor took the leſſee for the land) ſuch as have the land, albeit they be neither executors nor adminiſtrators or either of them but aſſignees, *&c.* ſhall be charged by the covenant though they be not named, for theſe covenants are ſaid to run with the land.

9. Who ſhall be bound and charged by a covenant: and againſt whom a writ of covenant doth lie: and where, or not.

Executors Adminiſtrators.

Co. ſuper Lit. 231. Dier 13. Bro. Covenant 6. Det. 80. If a feoffment, or leaſe be made to two, or to a man and his wife, and there are divers covenants in the deed to be performed on the part of the feoffees, or leſſees, and one of them doth not ſeal, or the wife doth, or doth not ſeal during the coverture, and he, or ſhe that doth not ſeal doth notwithſtanding accept of the eſtate and occupy the lands conveyed or demiſed; in theſe caſes, as touching all inherent covenants, as for payment of rent, and the acceſſaries thereof, as clauſes of diſtreſs, of re-entry, of *nomine pœnæ*, reparations and the like, they are bound by theſe covenants as much as if they do ſeal the deed. So if a leaſe be made to *A.* for years, or life, the remainder to *I. S.* in fee, and there is a rent reſerved, or there be divers covenants on the part of the grantees, and *I. S.* doth

(1) See further in what caſes an aſſignee ſhall take advantage of a covenant, *Cro. Eliz.* 373. *Cro. Car.* 137. *Br. Abr.* Covenant, *pl.* 45. *Com. Dig.* Covenant (B. 3.) *Vin. Abr.* Covenant (K.) *Bac. Abr.* Covenant (E. 5.)

(2) See more fully who ſhall take advantage of a covenant and who not. *Com. Dig.* Covenant (B.) 1 *Wood* 377. *Vin. Abr.* Covenant (H.) *Gilb.* Law of Covenants 294, 319, 323. *Bac. Abr.* Covenant (E.)

never ſeal the deed or counterpart; yet if in this caſe he accept the eſtate after the death of *A.* he muſt pay the rent and perform all the covenants that are inherent. So alſo if there be covenants in the King's Patent to be performed on the part of the patentee. As if there be this clauſe in the patent [and that *I. S.* (the patentee) ſhall repair the houſe when it is decayed;] in this caſe the patentee is bound by this covenant, and all ſuch like covenants. But *quære* of collateral covenants in the firſt caſes, for therein it ſeems the feoffee or leſſee is not bound. And yet it is ſaid, that if an indenture * be made between *A.* of the one part, and *B.* and *C.* of the other part, and therein there is a leaſe made by *A.* to *B.* and *C.* on certain conditions, and *B.* and *C.* are bound to *A.* by the indenture in twenty pounds to perform the conditions, and *B.* only doth ſeal the deed and not *C*; yet in this caſe if *C.* accept of the eſtate he is bound by the covenants, and one of them cannot be ſued without the other whiles they are both living. *Qui ſentit commodum ſentire debet et onus. Et tranſit terra cum onere.*

Experientia. Paſc. 14. Jac. B. R. Bret & Cumberland's caſe.

* P. 178.

Co. ſuper Lit. 231.

Heir.

If a man covenant for him and his heirs to do any thing whatſoever; hereby his heirs are bound (1). But otherwiſe except the heirs be bound by the deed by expreſs name, an heir ſhall ſcarcely be bound or charged in any caſe by a deed. And therefore it is that if the leſſee for years be ouſted by any other but the heir himſelf, no action of covenant will lie againſt the heir, unleſs there be an expreſs covenant wherein and whereby the leſſor and his heirs are bound. But if he be ouſted by the heir himſelf it ſeems an action of covenant will lie againſt him. And yet if he be ouſted by an elder title from the leſſor, *contra*, for in this caſe the heir ſhall not be charged.

Co. 5. 17. Bro. Covenant 38. 32 H. 6. 32. Dier 257. Fitz. Covenant 31.

Executors adminiſtrators.

If a man do covenant for himſelf only to pay money, build a houſe, for quiet enjoying, or the like, and he doth not ſay in the covenant [his executors, adminiſtrators, *&c.*] yet hereby his executors and adminiſtrators are bound and ſhall be charged (2). And yet if a leſſee for years covenant for himſelf to repair the houſes demiſed, omitting other words; it ſeems in this caſe he is bound to repair only during his life, and the executors or adminiſtrators are not bound (3). So if a leſſor covenant for himſelf only to diſcharge the leſſee of all quit rents out of the land; it ſeems this covenant is only perſonal, and ſhall bind the covenantor only during his life. But if in theſe caſes theſe words [during the term] be added in the covenant, as if a leſſee covenant for himſelf to repair the houſes during the term, or the leſſor covenant for himſelf to diſcharge the leſſee of all quit rents during the term; in theſe caſes it ſeems the executors and adminiſtrators alſo will be charged after his death (4).

10 H. 7. 10. Dier 19. 14. Bro. covenant 50 Dier 114.

If a leſſee be ouſted by one that hath title; it ſeems an action of covenant will lie for this ouſter againſt the executor

Dier 257.

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(1) But the heir is only chargeable ſo far as he has *aſſets* by deſcent from his anceſtor ſufficient to anſwer the charge, 1 *Pr. Wms.* 777. *Finch. Rep.* 86.

(2) But upon a covenant *implied*, an action of covenant will not lie againſt an executor. *Moor* 74. *Swan* v. *Scarles.*

(3) See the caſe of *Tilney* v. *Norris*, 1 Ld. *Raym.* 553.

(4) See accordingly *Gilb.* Covenants 331.

or adminiſtrator upon the covenant in law, if he were put out in the life time of the leſſor and not otherwiſe, for if there be tenant for life the remainder in fee to another, and the tenant for life by the words [demiſe or grant] doth make a leaſe for years and dye, and after, he in the remainder doth enter and put out the leſſee for years; in this caſe he cannot upon this covenant in law charge the executors or adminiſtrators of the leſſor. But upon an expreſs covenant for quiet enjoying he may (1).

Co. 5. 16. In ſome caſes an aſſignee ſhall be charged though he be not * named, and in ſome caſes ſhall not be charged though he be named, and in ſome caſes he ſhall be charged when he is named; as when the covenant doth extend to a thing in *eſſe*, parcel of the demiſe, there the thing to be done is appurtenant and *quodammodo* annexed to the thing, and ſhall bind the aſſignee though he be not expreſly named, as a covenant to repair, *&c.* But if the covenant be annexed to a thing not in *eſſe* before, but *de novo* to be erected on the thing, as to ſet up a new houſe, or the like; in this caſe, it will not bind the aſſignees unleſs they be named in the covenant. And if the covenant be to do a thing merely collateral; in that caſe it will not bind the aſſignees albeit they be named expreſly (2). Alſo when a contract is perſonal only, and a man doth bind himſelf and his aſſigns; his aſſigns ſhall not be bound hereby: as if one demiſe ſheep, or other ſtock of cattle, or any other perſonal goods, for any time, and the leſſee doth covenant for him and his aſſigns, at the end of the term to deliver them in as good plight as they were at the time of the demiſe, or ſuch a price for them, and the leſſee aſſign them; in this caſe, this covenant will not bind the aſſignee: but the executors and adminiſtrators of the firſt leſſee are bound hereby. So if one demiſe a houſe and land, with a ſtock or ſum of money, for years, rendring rent, and the leſſee doth covenant for him and his aſſignees to deliver the money at the end of the term; in this caſe an aſſignee ſhall not be bound by this covenant, as the executors and adminiſtrators of the leſſee ſhall.

Aſſignees or grantees.

* P. 179.

Executors.

Co. 5. 17. Dier 27. Bro. deſcent 30. If a leſſee covenant to repair the houſes demiſed, or to diſcharge the leſſor *de omnibus oneribus circa terram*, or the like; in theſe caſes, and ſuch like, albeit aſſignees be not named in the covenant, yet aſſignees, and aſſignees of aſſignees, *in infinitum*, and all others that ſhall come to the land by the act of law, or by the act of the parties, ſhall be bound and charged by this covenant.

Co. 5. 17. If a leſſee covenant for him and his aſſigns to build a new houſe upon the land demiſed, within ſeven years, and the

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(1) In what caſes the heir, or executors, ſhall be bound by expreſs covenant of the teſtator without naming them, and when an action will lie againſt them,—See *Vin. Abr.* Covenant (D.) *Gilb.* Covenants 327. *Com. Dig.* Covenant (C.) *Bac. Abr.* Covenant (E.)

(2) Mere collateral covenants that run with the land, that is, which extend to ſomething *in eſſe*, parcel of the demiſe, and affect the eſtate, lie between all thoſe who are privy in tenure or contract, though not named, like debt for rent at common law. And the reaſon is, becauſe uſually the rent is more or leſs accordingly, *et qui ſentit commodum ſentire debet et onus.* So a collateral covenant to be done upon the land, as to build *de novo*, ſhall bind the aſſignee by expreſs words; becauſe he is to have the benefit of it.—*Treatiſe of Equity* 39. See more amply on this ſubject the points reſolved in *Spencer's* caſe 5 *Co.* 16.—Alſo *Mo.* 399.. *Cro. Eliz.* 457. *Roll. Abr.* Covenant (L.)

leſſee

leſſee aſſign it over: in this caſe, the aſſignee is chargeable (1). But if a man covenant for him and his aſſigns to make a feoffment, obligation, or the like, in this caſe the aſſignee ſhall not be charged albeit he be named. And if the leſſee covenant for himſelf, or for himſelf, his executors and adminiſtrators, only to build a new houſe upon the land demiſed, and the leſſee aſſign over the land; in this caſe the aſſignee is not bound by this covenant.

If a leaſe be made rendring rent, and if it be in arrear that the leſſee his executors and aſſigns ſhall forfeit three ſhillings and four pence *nomine pœnæ*, and the leſſee aſſign the term; in this caſe it ſeems the aſſignee ſhall be charged with the *nomine pœnæ*. Thin's caſe. verſ. Chomſley. Trin. 36 El. C. B.

* P. 180. Note.

* And in all the caſes before, where a covenant is broken, an action of covenant may be brought (2). But herein note, that howſoever in divers of the caſes before, aſſignees are chargeable upon a covenant, yet the leſſee himſelf is not hereby diſcharged, but the leſſor or grantee of the reverſion hath election to charge which of them he will. And therefore if a leſſee covenant for him and his aſſigns to repair, and the leſſee aſſign; in this caſe the leſſor may have his action of covenant againſt either of them. And if a leſſee covenant for him, his executors, adminiſtrators, and aſſigns, to repair the houſes demiſed, and he in reverſion doth grant away his reverſion, and the leſſee aſſign his eſtate; in this caſe, albeit the grantee of the reverſion have accepted the rent of the aſſignee of the term, yet he may ſtill have an action of covenant againſt the executor of the leſſee upon this covenant (3). So if a patentee covenant for him and his aſſigns to repair, and he aſſign; the King may have his action againſt either of them (4). Bro. Covenant 32. Election. Hil. 16 Jac. B. R. Curia. Bret verſus Cumberland.

If *A.* and *B.* do covenant for themſelves jointly, without more words; the covenant is joint, and one of them cannot be charged without the other. But if they covenant for themſelves ſeverally, the covenant is ſeveral, and they may be ſued apart. And if they covenant jointly and ſeverally; then the covenant is joint and ſeveral, and they may be ſued either way at the election of the covenantee. Co. 5. 23.

10. When a covenant ſhall be ſaid to be gone and diſcharged; and when not; and how.

Where the deed itſelf wherein the covenants are contained, or the eſtate, on which the covenants as acceſſary to the principal do depend, is gone and determined, there regularly the covenants are gone alſo. And therefore if a leaſe for life or years be ſurrendred, whereby the eſtate is gone, or a deed become void by raſure or the like, and there be covenants contained in the deed; by theſe means the covenants are gone alſo. Dier 20. Co. 5. 23.

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(1) If the aſſignment is made within the ſeven years, but not otherwiſe.—Leſſee covenanted for him and his aſſigns to rebuild and finiſh a houſe within ſuch a time, and *after the time expired*, the leſſee aſſigned over the premiſſes, the houſe not being built and finiſhed according to the covenant. The covenant ſhall not bind the aſſignee, becauſe it was broke *before* the aſſignment: *aliter* if broke *after*, as if the leſſee had aſſigned before the term expired. *per Holt* Ch J. 1 *Salk.* 199.—S. P. 3 *Burr.* 1271.

(2) If a covenant is to make an eſtate in land, a ſuit in equity is moſt proper, becauſe a court of equity can give the thing itſelf, which is a higher and more adequate remedy than damages only, which is all the law gives. *per* Ld. *Hardwicke*, 3 *Atk.* 87. in the caſe of *Furnival* v. *Crew.*—See that caſe; and further when remedy may be had in equity upon a covenant. *Com. Dig.* Chancery (2 X. 6.)

(3) But although he may bring ſuch action againſt leſſee after acceptance of rent from aſſignee, yet he may not demand the rent of the leſſee after ſuch acceptance—*per Jerman* Juſt. *Sty.* 300. *Whitway* v. *Pinſent.*—See the ſame diſtinction in 1 *Sid.* 402.

(4) See more amply what covenants bind an aſſignee, and in what caſes covenant lies againſt him. *Vin. Abr.* Covenant (L.) (M.) *Gilb.* Covenant 333. *Bac. Abr.* Covenant (E. 3.)

40 E. 3. 27. Bro. Surrender 47. Covenant 42. Hil. 4 Jac. B.R. Moile v. Auſtin.

But this ſurrender doth not diſcharge the breach of covenant which was before the ſurrender. For if a Parſon leaſe his glebe for years, and after reſign, whereby the leaſe for years doth become void; in this caſe the covenants of the leaſe, as to the time before the reſignation, ſhall be ſaid to be in force ſtill (1).

Co. 1. 98. Plow. 286.

Where a covenant is become impoſſible to be done by the act of God, as where one doth covenant to ſerve another ſeven years, and he die before the ſeven years be expired; by this the covenant is diſcharged (2).

Co. 4. 80.

Where there is an expreſs covenant in a deed for quiet enjoying, the implied covenant is gone. *Expreſſum facit ceſſare tacitum.*

18 E. 4. 8. Releaſe.

By a releaſe of all covenants from the covenantee the covenant is diſcharged, ſo as the releaſe be by deed, for a covenant by deed * cannot be diſcharged by words. And therefore if *A.* by deed covenant with *B.* to build a houſe by a day, and *B.* doth wiſh him to let it alone; this is no diſcharge of the covenant (3).

* P. 181.

Paſc. 6 Car. B. R. Adjudged Bachelor's caſe.

If the leſſor accept the rent of the leſſee, or his aſſignee, after a covenant broken; this doth not diſcharge the breach of the covenant, but the leſſor may ſue for it notwithſtanding.

And ſo we come to a *warranty*, being a ſpecial kind of covenant, and therefore next in order to be ſpoken to.

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(1) So likewiſe if a parſon, after making a leaſe, becomes non-reſident. *Cro. Eliz.* 78. 245.

(2) See accordingly *Gilb.* on covenants 472.

(3) See fully in what caſes and in what manner covenants ſhall be ſaid to be ſuſpended, defeated, diſcharged, or void, in *Bac. Abr.* Covenant (G.) *Gilb.* 470. 1 *Wood* 397. 429. *Com. Dig.* Covenant (F.) Chancery (2 X. 3.) *Vin. Abr.* Covenant (O).

CHAP. VIII.

Of a Warranty.

1. Warranty. *Quid.*

A Warranty is a covenant real, annexed to lands or tenements, whereby a man and his heirs are bound to warrant the ſame (1). Or it is where a man is bound to warrant the land or hereditament that another hath. And he that doth make this warranty is called the warrantor; and he to whom it is made, the warrantee. Finchley 39. Co. ſuper Lit. 365.

Warrantor. Warrantee.

2. *Quotuplex.*

There are two kind of warranties. 1. A warranty in deed, or an expreſs warranty; which is when the ſame is expreſſed (2); *i. e.* when a fine, or feoffment by deed, is levied, or made in fee, or a leaſe for life is made by deed, comprehending warranty, or which hath an expreſs clauſe of warranty contained in it; as when a conuſor, feoffor, or leſſor doth covenant to warrant the land to the conuſee, feoffee, or leſſee; which is in theſe words: *Ego* I. S. *& heredes mei warrantizabimus & in perpetuum defendemus* W. S. *& heredibus ſuis tenementa predicta contra omnes homines in perpetuum* (3). And by the ſtatute of *Bigamis, Dedi* is made an expreſs warranty during the life of feoffor. Co. 1. 2. ſuper Lit. 365. 4. 81.

4 Ed. 1. c. [illegible].

2. A warranty in law, or an implied warranty; which is, when it is not expreſſed by the party, but *tacite* made and implied by the law; whereof ſee divers examples *infra*. The warranty in deed alſo is either lineal, which is thus deſcribed: A covenant real, annexed to the land by him which either was owner, or might have inherited the land, and from whom his heir lineal or collateral might by poſſibility have claimed the land, as heir from him that made the warranty. Or elſe it is collateral, which is thus deſcribed: A warranty made by him that had no right or poſſibility of right to the land, and is collateral to the title of the land. Alſo there is a warranty which doth commence by diſſeiſin or wrong; of all which * ſee divers examples afterwards. And note that all theſe things here are to be applied to warranties of lands, and concerning freeholds and inheritances; for there is a warranty of goods and chattles in contracts, of which we treat not here (4). Co. ſuper 383, 384. 370. 365.

* P. 182.

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(1) And either upon voucher, or by judgment in a writ of *warrantia chartæ*, to yield other lands and tenements to the value of thoſe that ſhall be evicted by a former title, or elſe may be uſed by way of rebutter. *Co. Lit.* 365. a.

(2) By the feodal conſtitution, if the vaſſal's title to enjoy the fee was diſputed, he might vouch, or call the lord or donor to warrant or inſure his gift; which if he failed to do, and the vaſſal was evicted, the lord was bound to give him another feud of equal value in recompence. And ſo by our ancient law, if before the ſtatute of *quia emptores* a man enfeoffed another in fee, by the feodal verb *dedi*, to hold to himſelf and his heirs by certain ſervices; *the law annexed a warranty to this grant*, which bound the feoffor and his heirs, to whom the ſervices (which were the conſideration and equivalent for the gift) were originally ſtipulated to be rendered. But in a feoffment in fee by the verb *dedi*, ſince the ſtatute of *quia emptores*, the feoffor only is bound to the implied warranty, and not his heirs; becauſe it is a mere perſonal contract on the part of the feoffor, the tenure (and of courſe the ancient ſervices) reſulting back to the ſuperior lord of the fee. And in other forms of alienation, gradually introduced ſince that ſtatute, no warranty whatſoever is implied: they bearing no ſort of analogy to the original feodal donation. And therefore in ſuch caſes it became neceſſary to add an *expreſs* clauſe of warranty to bind the grantor and his heirs, which is a kind of covenant real and can only be created by the verb *warrantizo*, or *warrant*. *Co. Lit.* 384. 2 *Bl. Com.* 300. See alſo *Fitz. Nat. Brev.* 134. *Sullivan's Lect.* 119.

(3) See Ld. *Coke's* obſervations on the words of the warranty, *Co. Lit.* 383. b.

(4) See further as to the ſeveral kinds of warranties, *Bac. Abr.* Warranty (A.) *Com. Dig.* Garranty (H.) *Sull. Lect.* 120. 1 *Wood* 335.

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Co. ſuper Lit. 265. 372. 365. 384. Co. 4. 121. 10. 97.

3. The fruit and effect of it, and what uſe may be made of it.

The fruit and effect of the warranty in deed is, that it doth always conclude and bar the warrantor himſelf of the land ſo warranted for ever; ſo that all his preſent and future rights, that he hath or may have therein, are hereby extinct. And therefore if the father be diſſeiſed, and the ſon in his life-time releaſe all his right to the land to the diſſeiſor, and make a warranty of the land in the deed, and then the father dieth, and the right of the land deſcendeth to the ſon; in this caſe, albeit the releaſe doth not bar the ſon, yet the warranty doth bar him. And for the moſt part alſo it doth conclude and bar the heirs of him that made the warranty, to whom the ſame warranty doth deſcend, to demand the ſame land againſt the warranty; for if it be a lineal warranty, it is a bar of an eſtate in fee ſimple without any aſſets, *i. e.* without any other land deſcended to him in fee ſimple from the ſame anceſtor that made the warranty: And with aſſets it is a bar of an eſtate in tail. And if it be a collateral warranty, it is, with or without aſſets, a bar of an eſtate in fee ſimple or fee tail, and all poſſibility of right thereunto; and yet ſo as it doth not paſs any eſtate or right, but only bind the right, ſo long as the warranty is in force; for if the warranty be avoided the right may be revived. But neither the lineal nor collateral warranty can enlarge an eſtate. And therefore if a leſſor by deed releaſe to his leſſee for life, and warrant the land to him and his heirs; this doth not make his eſtate greater, neither will it bar titles of entry, or action, in caſes of mortmain, conſent to a raviſhor, mortgage, or dower. And therefore if an anceſtor of the Lord hath title to enter upon an alienation in mortmain, and he releaſe, or make a feoffment with warranty; this warranty will neither bar him nor his heir. So if a collateral anceſtor will make a warranty, which doth after deſcend upon one that hath title of entry upon a condition broken; this will not bar his entry, *&c.* neither will it bar any right that ſhall commence after the warranty made. And the warranty that doth commence by diſſeiſin doth not bind or bar any eſtate with or without aſſets.

Co. ſuper Lit. 265. Co. 10. 98, 99. Dier 42. Co. ſuper Lit. 101.

And in caſes where the lineal or collateral warranty is a bar, there if the party be impleaded by him or his heirs that made the warranty, the party impleaded that is tenant of the land, may plead and ſhew forth this warranty againſt him, and demand judgement, whether he contrary to his own warranty ſhall be ſuffered or received to demand the thing warranted; and this in pleading is called a rebutter (1). And if he be impleaded or ſued by another for * the land, then he to whom the warranty is made, or his heirs, may vouch, *i. e.* call in the warrantor or his heirs to warrant the land. And this is an interpleader, in the nature of an action brought by the warrantor againſt the warrantee, wherein he that doth vouch, (called the vouchor) is demandant, and he that is vouched (called the vouchee) is made tenant or defendant to the action, and the vouchor is as it were out of the ſuit. And this ſecond tenant, the vouchee, is called the tenant by the warranty. And hereupon ſhall iſſue forth to the ſheriff a writ to ſummon the vouchee to appear, called a *Summons ad warrantizandum.* And

Rebutter. *Quid.*

* P. 183.

Voucher. *Quid.*

Vouchor. Vouchee.

Tenant by the warranty. *Quid.*

(1) For the derivation and explanation of rebutter, ſee *Co. Lit.* 303. b. 365. a. *Com. Dig.* Garranty (K. 3.) Pleader (K.) *Vin. Abr.* Voucher (A. c. 3.)

if

Summoni ad warrantizandum. Quid.

if the vouchee appear he muſt plead to the voucher, and if he ſhew cauſe why he ſhould not warrant, that muſt be tried; and this ſhewing of cauſe is called a counterplea to the voucher: but if he plead in avoidance of the warranty, it is called a counterplea to the warranty. And if he cannot gainſay the warranty, the ſtranger ſhall recover the land demanded againſt the vouchor, and he ſhall recover as much other land againſt the vouchee of the lands he hath or had at the time of the voucher. And this recovery of other land is called a recovery in value. And if the vouchee hath at the time of the voucher and recovery no lands deſcended to him to anſwer the warranty, but hath afterwards land happening to him by deſcent from that anceſtor, then he may have a reſummons and recover the land that doth after happen. But if the ſheriff return upon the ſummons, that the vouchee is ſummoned, and he doth make default, then he ſhall have a *Magnum cape ad valentiam*; when if he make default again, the judgment ſhall be given againſt the vouchor, and he ſhall recover over in value againſt the vouchee; and if the vouchee appear, and then make default, the vouchor ſhall have a *parvum cape ad valentiam*; and then if he make default, judgement ſhall be given as before. But if the ſheriff return upon the ſummons, he hath nothing whereby he may be ſummoned, then may the vouchor have a writ called *Sequatur ſub ſuo periculo*; whereupon ſhall go an *Alias* and *Pluries*; and if the like return be made, the demandant ſhall have judgement againſt the firſt tenant, but he cannot recover in value againſt the vouchee. And if the caſe be ſo, that the vouchee had a warranty from ſome other for the land, he may dearaigne, *i. e.* maintain the warranty over, and ſhall recover in value over alſo againſt his vouchor in the ſame manner as before.

Counterplea to the voucher. *Quid.*

Counterplea to the warranty. *Quid.*

Recovery in value. *Quid.*

Sequatur ſub ſuo periculo. Quid.

Dearaignment *del Garranty. Quid.*

Or the warrantee to whom the warranty is made, or his heirs, may at any time before they be impleaded for the land, if they will, bring a *warrantia chartæ* upon the warranty in the deed againſt the warrantor or his heirs; and hereby all the land, the heir of the warrantor hath by deſcent from the anceſtor that made the warranty, at the time of this writ brought, ſhall * be bound and charged with the warranty, into whoſe hands ſoever it go afterwards; ſo that if the land warranted be after recovered from the warrantee, he ſhall recover ſo much land over again of the other land of the heir of the warrantor, or of the warrantor himſelf if he be living. And albeit the warrantee or his heirs do recover in this writ, yet he may after upon occaſion vouch the warrantor or his heirs notwithſtanding. And herein obſerve it is good policy, if a man ſuſpect any thing, to bring this writ of *warrantia chartæ* betimes; becauſe it binds all the land of the warrantor from the time of the writ brought, and not any of his other lands he had before that time that are now aliened (1).

F. N.B. 134. Co. ſuper Lit. 102.

Warrantia chartæ. Quid.

* P. 184.

4. What words and clauſes in a deed will make a warranty: or not.

The words *Dedi & conceſſi*, or *Dedi* only, in a feoffment do make a warranty, when an eſtate of frank-tenement or inheritance doth paſs by the deed. But the word *conceſſi* only, or *demiſi & conceſſi*, do not make ſuch a warranty.

Co. ſuper Lit. 383, 384. Co. 4. 81.

(1) Upon what warranty this writ lies, by whom it may be had, and when, and how it was to be brought, ſee *Vin. Abr.* tit. Warrantia Chartæ. *Bro. Abr.* ſame title. *Fitz. Nat. Brev.* 134. with the notes to the laſt edition; and *Com. Dig.* Pleader (3 N).

And by force of the ſtatute of *Bigamis chap.* 6, *Dedi* is made an expreſs warranty during the life of the feoffor.

Lit. Sect. 733. Co. 5. 17, 18.

The word, *Warrantizo*, or warrant, is the only apt and effectual word to make an expreſs warranty, or a warranty in deed, and therefore this word only is uſed in fines. And the words *Defendo*, or *Acquieto*, albeit they be commonly uſed in deeds, yet of themſelves without the other will not make a warranty (1).

Dier 42. Co. ſuper Lit. 383.

If a man by deed doth grant to warrant land to *I. S.* and his heirs, and the warrantor doth not bind his heirs to the warranty; or doth not warrant to *I. S.* and his heirs, but to *I. S.* only; or doth warrant to *I. S.* and his aſſigns, and not to *I. S.* and his heirs; or doth bind himſelf and his heirs to warrant the land, but doth not ſay how long, nor againſt whom; theſe are good warranties, but how they ſhall be taken, ſee afterwards (2).

Co. ſuper Lit. 366. 389.

A warranty in deed may be annexed to eſtates of inheritance or freehold; and that not only of corporal things which paſs by livery, as houſes, lands, and the like, but alſo of incorporal things which lie in grant, as advowſons, rents, commons, eſtovers, and the like, which iſſue out of lands or tenements; and that not only to inheritances in *eſſe*, but alſo to ſuch as are newly created, as a man (ſome ſay) may grant a rent, *&c. de novo* out of land for life, in tail, or in fee, with warranty. So a warranty in law may extend to a rent newly created; and therefore if ſuch a rent be granted in exchange for an acre of land, this exchange and warranty thereunto annexed is good. But a warranty may not be annexed to an eſtate or leaſe for years, albeit it be a leaſe of one thouſand years, nor to any other chattel, and therefore in all actions the which leſſee for years may have as treſpaſs, *&c.* a warranty cannot be pleaded in bar (3).

5. To what things a warranty may be annexed and extended: and to what not: and how.

Co ſuper Lit. 372. 385. Lit. Sect. 738. 745. 706.

* A warranty may be made upon any kind of conveyance, as upon fines, feoffments, gifts, *&c.* alſo a warranty may be made by and upon releaſes and confirmations, made to the tenant of the land, albeit he that makes the releaſe or confirmation hath no right to the land, *&c.* And yet ſome ſay, that by a releaſe or confirmation, where there is no eſtate created, or tranſmutation of the poſſeſſion, a warranty cannot be made to the aſſignee. But if *A.* be ſeiſed of land in fee, and *B.* doth releaſe to him, or doth confirm his eſtate in fee, with warranty to him, his heirs, and aſſigns; in this caſe all men agree this warranty to be good; and ſo alſo it ſeems it is in the caſe laſt before, and that both the party himſelf, and the aſſignee may vouch (4).

* P. 185.

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(1) See *Mad. Form. Angl.* 77. in *p.* 43. and for the forms of warranties, the references in the index of of that book, under the word Warranty.

(2) See accordingly 1 *Wood* 335: and further what words, or clauſes make a warranty, *Com. Dig.* Garranty (A.) *Bac. Abr.* Warranty (C.)—Warranties (ſays the learned author of the Commentaries in 2 vol. 304.) have, in modern practice, been totally ſuperſeded by covenants; becauſe, if the covenantor covenants for himſelf and his *heirs*, it is then a covenant real, and deſcends upon the heirs, who are bound to perform it, provided they have aſſets by deſcent, but not otherwiſe; if he covenants alſo for his *executors*, and *adminiſtrators*, his perſonal aſſets, as well as his real, are likewiſe pledged for the performance of the covenant, which makes ſuch a covenant a better ſecurity than any warranty.

(3) But a purchaſer of goods and chattels may have a ſatisfaction from the vendor if he ſells them as his own and the title proves deficient, tho' there is no expreſs warranty for that purpoſe, *Cro. Jac.* 474. 1 *Roll. Abr.* 90. See fully as to warranty of goods and chattels in *Bac. Abr.* tit. Actions on the caſe (E.) and *Stiles Prac. Reg.* 656.

(4) See further as to what things, and in what manner, warranties may be annexed, in *Bac. Abr.* Warranty (B.) *Vin. Abr.* Voucher (B. 6.) *Com Dig.* Garranty (E).

6. What ſhall be a good warranty in law: and how it ſhall bar and bind.

A warranty in law may be good in its creation, albeit it be made without deed; for if a man by his laſt will and teſtament deviſe lands to another man for life, or in tail, rendring rent; to this eſtate there is a warranty in law annexed (1). Co. ſuper Lit. 384. 386.

The words *Dedi & conceſſi*, or *Dedi* only in a feoffment, make a good warranty in law. But the word *Conceſſi* only in fine or feoffment, doth not make a warranty in law. And albeit there be an expreſs warranty in the deed, yet this doth not take away the implied warranty of the law. And this warranty in law by *Dedi & Conceſſi*, or by *Dedi* only, is a general warranty during the life of the feoffor. Co. ſuper Lit. 384. F.N.B. 134. Co. 4. 80.

Partition. Exchange.

Every partition and exchange implieth in it, and hath annexed to it, a ſpecial warranty in law (2): how it ſhall bar and be extended, ſee in *Exchange*. Co. ſuper Lit. 102. 384.

Every tenure by homage anceſtrel, *i. e.* where a tenant and his anceſtors have held land of a Lord and his anceſtors, time out of mind by homage, hath a warranty in law annexed to it, by which the Lord is bound to warrant it to the tenant and his heirs. Co. 4. 80.

If one make a gift in tail, or leaſe for life of land, by deed, or without deed, reſerving a rent, or of a rent-ſervice by deed; in theſe caſes, there is annexed an implied warranty againſt the donor or leſſor, his heirs and aſſigns. Co. ſuper Lit. 334.

When dower is aſſigned to a woman, there is a warranty in law included, which is, that the tenant in dower being impleaded, ſhall vouch and recover in value a third part of the two parts whereof ſhe is dowable. Co. ſuper Lit. 384.

And this warranty in law is of the nature of a lineal warranty, and ſhall bind as a lineal warranty only, for it doth never bar any collateral title. And hence it is, that this warranty and aſſets in ſome caſes, is a good bar; as, if tenant in tail exchange for other lands which are deſcended to the iſſue, and he hath accepted of them, or if not, that other lands are deſcended to him. But if tenant in tail of lands, make a gift in tail, or leaſe for life, rendring rent, and * die; in this caſe this is no bar. And yet if other aſſets in fee ſimple deſcend, this warranty in law and aſſets is a good bar (3). Co. ſuper Lit. 384.

* P. 186.

7. What ſhall be ſaid a good warranty in deed: or not: and how it ſhall bar and bind.

To every good warranty in deed, that muſt bar and bind, theſe things are requiſite. 1. That the perſon that doth warrant, be a perſon able: for if an infant make a feoffment in fee of land, and thereby doth bind him and his heirs to warrant the land; in this caſe, albeit the feoffment be only voidable, yet the warranty is void. Co. ſuper Lit. 367.

Infant.

2. That the warranty be made by deed in writing: for if a man make a feoffment by word, and by word bind him and his heirs to warrant the land; this is not a good warranty. So if a man give lands to another by his laſt will, and thereby bind him and his heirs to warrant it; this warranty, albeit the will be in writing, is void (4). 3. That there be ſome eſtate to which the warranty Lit. Sect. 703. Co. ſuper Lit. 386. Co. 10. 96. & ſuper Lit. 384.

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(1) Warranties in law, are ſo called, becauſe in judgment of law they amount to a warranty without the verb *Warrantizo*. *Co. Lit.* 384. a.

(2) See accordingly, 2 *Roll. Abr.* 739.

(3) See more amply in what caſes the *law* will create a warranty, *Vin. Abr.* Voucher (A. 2.) *Bac. Abr.* Warranty (E.)

(4) Becauſe a will in writing is no deed, and therefore an *expreſs* warranty cannot be created by will; but a warranty *in law* may be created by will, and may bind the heir, though it never bound the anceſtor. *Co. Lit.* 386. a.

is annexed, that may ſupport it: for if one covenant to warrant land to another and make him no eſtate, or make him an eſtate that is not good, and covenant to warrant the thing granted; in theſe caſes the warranty is void. 4. That the eſtate to which the warranty is annexed, be ſuch an eſtate as is able to ſupport it; and therefore that it be a leaſe for life at the leaſt: for if one make a leaſe for years of land, and bind himſelf and his heirs to warrant the land; this is no good warranty, neither will it have the effect of a warranty: but this may amount to a covenant, on which an action of covenant may be brought. 5. That the warranty deſcend upon him that is heir of the whole blood by the common law to him that made the warranty, and not upon another: for if tenant in tail in borough Engliſh (where by cuſtom the youngeſt ſon is to inherit) diſcontinue the tail, and have iſſue two ſons, and the uncle releaſe to the diſcontinuee with warranty, and dieth; this is no good warranty to bind the younger ſon (1). So if in this caſe, tenant in tail diſcontinue the tail with warranty, *&c.* having two ſons, and die ſeiſed of other lands in the ſame borough in fee ſimple, to the value of the lands in tail; the younger ſon is not barred by this warranty. So if one give his land to the eldeſt ſon, and the heirs males of his body, the remainder to the ſecond ſon, *&c.* and the eldeſt ſon doth alien with warranty, having iſſue a daughter, and die; this is no good warranty to bar the ſecond ſon. So if tenant in tail have iſſue two daughters by divers venters and die, and they enter, and a ſtranger doth diſſeiſe them, and one of them doth releaſe all her right, and bind her and her heirs to warrant it; in this caſe the warranty is not good to bar the ſiſter: but if they had been by one venter, *contra*. So if two brothers be by demy venters, and the eldeſt doth releaſe with warranty to the diſſeiſor of the uncle, and dieth without iſſue, and the younger dieth; this is no good warranty to bar the younger brother, for a warranty muſt * evermore deſcend upon him that is heir at the common law to him that made it. 6. That he that is heir do continue to be ſo, and that neither the deſcent of the title, nor the warranty, be interrupted: for if one bind him and his heirs to warranty, and after is attainted of treaſon or felony, and die; this warranty doth not bind his heirs. So if tenant in tail be diſſeiſed, and after releaſe to the diſſeiſor with warranty, and after the tenant in tail is attainted of felony, and hath iſſue and die; this warranty will not bind the iſſue. 7. That the eſtate of freehold that is to be barred be put to a right before, or at the time of the warranty made; and that he to whom the warranty doth deſcend, have then but a right to the land: for a warranty will not bar any eſtate of freehold or inheritance in *eſſe* in poſſeſſion, reverſion, or remainder, that is not diſplaced, and put to a right, before, or at the time of the warranty made; though after, at the time of the deſcent of the warranty, the eſtate of freehold or inheritance be diſplaced and deveſted. And therefore if there be father and ſon, and the ſon hath a rent-ſervice, ſuit to a mill, rent-charge, rent-ſeck, common of paſture, or other profit apprender out of land of the father, and the father maketh a

Co. ſuper Lit. 378. 26 H. 8. 9.

Co. ſuper Lit 12. Lit. fol. 161. Sect. 735.

Lit. fo. 161.

Lit. Sect. 737.

Co. ſuper Lit. 387. Lit. Sect. 718.

* P. 187.

Lit. Sect. 745. 746.

Co. 10. 96. 97. ſuper Lit. 388. 21 H. 7.

(1) Becauſe a warranty cannot go according to the nature of the tenements by the cuſtom, *&c.* but only according to the form of the common law. *Lit. ſect.* 735.

feoffment

feoffment in fee with warranty, and dieth, this ſhall not bar the ſon of the rent, common, *&c.* And albeit the ſon after the feoffment with warranty, and before the death of the father, had been diſſeiſed, and ſo, being out of poſſeſſion, the warranty had deſcended upon him, yet this warranty ſhould not bind him. So if my collateral anceſtor releaſe to my tenant for life, with warranty, and die, and this warranty deſcend upon me; this ſhall not bind my reverſion, or remainder. But if in the caſe before, the ſon be diſſeiſed of the rent, *&c.* and affirm himſelf to be diſſeiſed by the bringing of an aſſiſe, (for otherwiſe he ſhall not be ſaid to be out of poſſeſſion of a rent, or the like) and after the father doth releaſe with warranty and die; in this caſe the collateral warranty ſhall bind and bar the ſon of his rent, *&c.* And if in the laſt caſe, my tenant for life be diſſeiſed, and my anceſtor doth releaſe to the diſſeiſor with warranty, and die; this is a good warranty to bar and bind me. 8. That the warranty doth take effect in life time of the anceſtor, and that he be bound by it; for the heir ſhall never be bound by an expreſs warranty; but where the anceſtor was bound by the ſame warranty, and therefore a warranty made by will, is void. 9. That the heir claim in the ſame right that the anceſtor doth: for if one be a ſucceſſor only in caſe of a corporation, he ſhall not be bound by the warranty of a natural anceſtor (1). 10. That the heir that is to be barred by the warranty, be of full age at the time of the fall of the warranty: for if my anceſtor make a feoffment, or a releaſe with warranty, and at this time I am within age, * and after he die, and the warranty deſcend upon me within age; this warranty ſhall not bind me: but if I become of age after the warranty of my anceſtor, and before his death; in this caſe the warranty may bar me. And in the firſt caſe it will bar me alſo, while it is in force; but I may by my entry avoid it. And the ſame law is of a woman covert. And yet if the entry of an infant, or a woman covert, be not lawful, when the warranty doth deſcend; in this caſe the warranty ſhall bind them as well as any other; for ſuch warranty cannot be avoided but by entry and avoiding the eſtate. And where the huſband is within age at the time of the deſcent of a warranty to his wife, and the entry of the wife is taken away, there the warranty ſhall bind the wife.

Lit. Sect. 734.

Co. ſuper Lit. 370.

Lit. Sect. 726. Co. 1. 67. 140. ſuper Lit. 380.

* P. 188.

If lands be given to *A.* for life, and after to the next heir male of *A.* and the heirs male of the body of that heir male, and *A.* having iſſue *B.* makes a feoffment of the land with warranty to *I. S.* this is a good warranty and a bar to the iſſue; for a man may be barred of his right by a warranty which he could never avoid: as, where leſſee for life is diſſeiſed, and a collateral anceſtor of the leſſor doth releaſe to the diſſeiſor with warranty and die, and this doth deſcend upon the leſſor; by this he is barred.

Co. 1. 66. 44 Ed. 3. 30. 44 Aſſ. pl. 35.

A warranty made for life, or in tail, is good, and ſhall bind for ſo long only; as if tenant in tail of land let it for life, the remainder to another in fee, and a collateral anceſtor doth confirm the eſtate of the tenant for life, and die, and the tenant in tail hath iſſue; this is a bar to the iſſue during the life of

Lit. Sect. 738. Co. ſuper Lit. 387.

(1) The warranty of the predeceſſor doth not bind the ſucceſſor, 2 *Inſt.* 155.

the tenant for life. And in this caſe upon a voucher the recovery in value ſhall be put for life only.

Co. 10. 96. If one make a gift in tail, and grant to warrant the land given according to the gift; this warranty is good no longer than the eſtate doth laſt. And no warranty that a donor can make, in this caſe, can bar him of the land, if the donee die without iſſue, and the eſtate determine.

Co. 8. 52. ſuper Lit. 373. And where a warranty doth bar, it is entire, and doth extend to all the land, and to all perſons, upon whom it doth deſcend, and is a bar of all the right that every one of them hath in the land; ſo that if they have all right jointly or ſeverally, or one only hath all the right and the reſt none, he that hath the right is barred. And therefore if lands be given to *A.* and the heirs of his body, and for want of ſuch iſſue to *E.* his ſiſter and the heirs of her body, and *A.* doth make a feoffment with warranty, and die without iſſue, having two ſiſters *E.* and *S.* this is a bar to *E.* for the whole, albeit the warranty deſcend on her and another.

Co. 5. 79. If there be tenant for life, the remainder to his ſon and heir apparent in tail, and the father doth make a feoffment in fee with * warranty and dieth; in this caſe this is a good warranty, * P. 189. and will bar the ſon, albeit it be made of purpoſe to bar him. But if by agreement and covin between him and *A.* and *B.* he make a leaſe to *A.* who makes a feoffment in fee to *B.* to whom the father doth releaſe with warranty, thinking by a collateral warranty to bar his ſon; this is no bar, for this warranty began by diſſeiſin: and if in the firſt caſe the ſon doth enter in the life time of the father upon the land, he doth avoid the warranty.

Co. 1. 66. If the father be tenant for life, the remainder to the next heir male of the father, and to the heirs males of the body of ſuch next heir male, and the father makes a feoffment to *I. S.* with warranty and dieth; it ſeems this warranty is a good bar to the heir; and in this caſe the heir cannot enter in the life time of his father, for he cannot be heir male unto his father until his father's death.

Co. ſuper Lit. 366, 365. Co. 1. 67. Stat. Glouc. ch. 6. Lit. Sect. 724, 725. If tenant for life make a feoffment with warranty, or be diſſeiſed, and releaſe with warranty, and he in reverſion, being heir to the tenant for life, doth not enter, but ſuffer the leſſee for life to die, and thereby the warranty to fall and deſcend upon him; in this caſe, this warranty generally is a bar without any aſſets. But if he that doth ſo alien, *&c.* be tenant by the curteſy, this is no bar to the heir, without aſſets in fee-ſimple from the tenant by the curteſy, and then it is a bar for ſo much. And if the heir, for want of this aſſets at the time, doth recover the land from his mother, and after aſſets doth deſcend from the father; in this caſe the tenant ſhall recover the ſame land of the mother again. And if ſhe that doth ſo alien, *&c.* be tenant for life of the inheritance or purchaſe of her deceaſed huſband, or given unto her by any of the anceſtors of her huſband, or by any other perſon ſeiſed to the uſe of her huſband, or of any of his anceſtors; in this caſe, her alienation, releaſe, or confirmation with warranty, ſhall not bind the heir whether he have aſſets or not. But if a man convey lands to the uſe of himſelf, *B.* his wife, and the heirs of his body, and they have iſſue *C.* and the father dieth, and *C.* diſſeiſeth his mother, or

Stat. 11 H. 7. chap. 20. Lit. Sect. 727. Co. ſuper Lit. 365.

Co. 3. 58.

getteth a feoffment from a diſſeiſor, and then ſuffereth a recovery with a ſingle voucher, and after the mother doth releaſe to the recoverer with warranty; in this caſe the warranty is a bar to the iſſue, and not void by the ſtatute of 11 *H.* 7.

If the huſband that is ſeiſed of lands in the right of his wife levy a fine, or maketh a feoffment in fee with warranty, and the wife dieth, and then the huſband dieth; this warranty ſhall not bind the heir of the wife without aſſets of other land in fee-ſimple from the father, albeit he be not tenant by the curteſy, but it is before her death that he doth make the eſtate and the warranty. But a fine levied by the huſband and wife, in this caſe, is a good bar to the heir. Co. ſuper Lit. 366. 381. Stat. Glocc. ch. 6. Lit. Sect. 332.

* P. 190. Fine.

* If tenant in tail that is in of another eſtate, *i. e.* either by diſſeiſin, or by the feoffment of a diſſeiſor, doth ſuffer a common recovery, and a collateral anceſtor of the tenant in tail doth releaſe with warranty to the recoveror, and after the recoveror doth make a feoffment to uſes executed by the ſtatute of 27 *H.* 8. and after the collateral anceſtor dieth; in this caſe albeit the eſtate of the land be transferred in the poſt before the deſcent of the warranty, yet it ſhall bind. So if he to whom the warranty is made ſuffer a common recovery, and after the anceſtor dieth. But if tenant in dower enfeoff a villain with warranty, and the Lord of the villain enter into the land before the deſcent of the warranty, and after the woman dieth; this warranty ſhall not bind the right of the heir. So if a collateral warranty be made to a baſtard and his heirs, and living the anceſtor, the baſtard dieth without iſſue, and the Lord by eſcheat doth enter, and after the anceſtor dieth; this warranty ſhall not bind. Co. 3. 62. 22 Aſſ pl. 37. 29 Aſſ. pl. 34.

A collateral warranty may deſcend upon an iſſue in tail before the right deſcend, and yet be good, with this difference, that the right be in *eſſe* in ſome of the anceſtors of the heir at the time of the deſcent of the warranty; as if tenant in tail diſcontinue the tail in fee, and the diſcontinuee is diſſeiſed, and the brother of the tenant in tail releaſeth all his right, *&c.* to the diſſeiſor with warranty, and dieth without iſſue, and the tenant in tail hath iſſue and dieth; in this caſe, the iſſue is barred. But otherwiſe it is where the right is not in *eſſe* in the heir, or any of his anceſtors, at the time of the fall of the warranty; as if Lord and tenant be, and the tenant make a feoffment in fee with warranty, and after the feoffee doth purchaſe the ſeigniory, and after the tenant doth ceaſe; in this caſe the Lord ſhall have a ceſſavit; for a warranty doth never bar any right, that doth commence after the warranty (1). Lit. Sect. 7 H. Co. ſuper Lit. 388.

8. What ſhall be ſaid a lineal warranty: and how ſuch a warranty ſhall bar.

If the caſe be ſo that if no ſuch warranty had been made by the father or other anceſtor, the right of the lands or tenements ſo warranted, had or might have deſcended or come from the ſame anceſtor, and that from and by him that made the ſame warranty, ſuch a warranty is a lineal warranty (2). Lit. Sect. 703. 711.

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(1) See accordingly in 1 *Wood* 335 to 338, and further what ſhall be ſaid a good warranty in deed, and who ſhall be bound by it, in *Com. Dig.* Garranty (B.) *Vin. Abr.* Voucher (B. 2.) *Bac. Abr.* Warranty (D.)

(2) Lineal warranty was where the heir derived, or might by poſſibility have derived, his title to the land warranted either from or thro' the anceſtor who made the warranty; as, where a father, or an elder ſon in the life of the father, releaſed to the diſſeiſor of either themſelves or the grandfather with warranty, this was lineal to the younger ſon. 2 *Bl. Com.* 301.—Warranty lineal is where a man ſeized in fee, or in tail, makes a feoffment to another, and binds him and his heirs to warranty, and hath iſſue a ſon, and dieth, and the warranty deſcends to the ſon. *Curſon's* Law of Eſtates Tail. 269.

As if a man be ſeiſed in fee of land, and make a feoffment of it to another, and bind him and his heirs to warrant the land, and hath iſſue and die, and the warranty doth deſcend upon the iſſue; this is a lineal warranty, for that, if none ſuch had been, the right of the land had deſcended to him as heir to his father, and he muſt have made his deſcent by him. And if there be grand-father, father and ſon, and the grand-father be diſſeiſed, and the father releaſe to the diſſeiſor being in poſſeſſion with warranty, *&c.* and dieth, and after the grandfather dieth; this is a lineal warranty to the ſon, and albeit in this caſe the warranty deſcend * before the right, yet it is a good bar. And if there be two brothers, and the father is diſſeiſed, and the eldeſt brother doth releaſe with warranty, and die without iſſue, and after the father dieth, and the warranty doth deſcend to the younger ſon; this is a lineal warranty to him. And if lands be given to *A.* for life, the remainder to his right heirs, and he doth make a feoffment with warranty and die; this is but a lineal warranty. And if two parcenours be, and the eldeſt enter into all the land to her own uſe, and then doth make a feoffment with warranty and dieth without iſſue; this as to her own part is a lineal warranty, but as to her ſiſter's part is a collateral warranty. And in every caſe where one doth demand an eſtate tail, if any anceſtor of the iſſue in tail, whether he had poſſeſſion of the land or not, hath made a warranty, and if the iſſue, that were to bring a writ of formedon, may or might have, by poſſibility of ſome matter that might have been done, conveyed to himſelf a title by force of the gift by him that made the warranty; this is a lineal warranty. As if a man be ſeiſed of land of an eſtate tail to him and the heirs of his body begotten, and make a feoffment of it, and bind him and his heirs to warrant it, and hath iſſue and dieth; this warranty deſcending upon the iſſue is a lineal warranty (1). And if lands be given to one and the heirs males of his body, and for want of ſuch iſſue to the heirs females of his body, and the donee doth make a feoffment with warranty, and hath iſſue a ſon and a daughter and dieth; this warranty is lineal to the ſon, and if the ſon die without iſſue male, it is a lineal warranty from the father to the daughter. But if the brother in his life time releaſe to the diſcontinuee, *&c.* with warranty, *&c.* and after dieth without iſſue; this is a collateral warranty to the daughter. If lands be given to the huſband and wife, and the heirs of their two bodies engendred, and they have iſſue, and the huſband diſcontinue and die, and after the wife doth releaſe with warranty and die; this is a lineal warranty. And if lands be given to a man and a woman unmarried, and the heirs of their two bodies, and they intermarry, and are diſſeiſed, and the huſband doth releaſe with warranty, and dieth, and after the wife dieth; this is a lineal warranty to the iſſue for all the land. And if tenant in tail have iſſue three ſons and diſcontinue, and the middle brother doth releaſe with warranty, and die without iſſue, and after the father dieth, and after the elder brother dieth without iſſue, ſo that the warranty doth deſcend to the younger brother; this is a lineal

Co. ſuper Lit. 374.

Lit. Sect. 707.

* P. 191.

Co. 1. 66. 67.

Co 8. 52. New terms of the law tit. Warranty.

Lit. Sect. 719.

Lit. Sect. 714.

Co. ſuper Lit. 375.

Lit. Sect. 718.

(1) *Lineal* warranty is that which is made by tenant in tail, *collateral* that which is made by a ſtanger to the intail.—ſee further in *Sull. ſect.* 165.

warranty

getteth a feoffment from a diſſeiſor, and then ſuffereth a recovery with a ſingle voucher, and after the mother doth releaſe to the recoverer with warranty; in this caſe the warranty is a bar to the iſſue, and not void by the ſtatute of 11 *H.* 7.

If the huſband that is ſeiſed of lands in the right of his wife levy a fine, or maketh a feoffment in fee with warranty, and the wife dieth, and then the huſband dieth; this warranty ſhall not bind the heir of the wife without aſſets of other land in fee-ſimple from the father, albeit he be not tenant by the curteſy, but it is before her death that he doth make the eſtate and the warranty. But a fine levied by the huſband and wife, in this caſe, is a good bar to the heir. Co. ſuper Lit. 366. 381. Stat. Glocc. ch. 6. Lit. Sect. 332.

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8. What ſhall be ſaid a lineal warranty: and how ſuch a warranty ſhall bar.

If the caſe be ſo that if no ſuch warranty had been made by the father or other anceſtor, the right of the lands or tenements ſo warranted, had or might have deſcended or come from the ſame anceſtor, and that from and by him that made the ſame warranty, ſuch a warranty is a lineal warranty (2). Lit. Sect. 703. 711.

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(1) See accordingly in 1 *Wood* 335 to 338, and further what ſhall be ſaid a good warranty in deed, and who ſhall be bound by it, in *Com. Dig.* Garranty (B.) *Vin. Abr.* Voucher (B. 2.) *Bac. Abr.* Warranty (D.)

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As if a man be ſeiſed in fee of land, and make a feoffment of it to another, and bind him and his heirs to warrant the land, and hath iſſue and die, and the warranty doth deſcend upon the iſſue; this is a lineal warranty, for that, if none ſuch had been, the right of the land had deſcended to him as heir to his father, and he muſt have made his deſcent by him. And if there be grand-father, father and ſon, and the grand-father be diſſeiſed, and the father releaſe to the diſſeiſor being in poſſeſſion with warranty, *&c.* and dieth, and after the grandfather dieth; this is a lineal warranty to the ſon, and albeit in this caſe the warranty deſcend * before the right, yet it is a good bar. And if there be two brothers, and the father is diſſeiſed, and the eldeſt brother doth releaſe with warranty, and die without iſſue, and after the father dieth, and the warranty doth deſcend to the younger ſon; this is a lineal warranty to him. And if lands be given to *A.* for life, the remainder to his right heirs, and he doth make a feoffment with warranty and die; this is but a lineal warranty. And if two parcenours be, and the eldeſt enter into all the land to her own uſe, and then doth make a feoffment with warranty and dieth without iſſue; this as to her own part is a lineal warranty, but as to her ſiſter's part is a collateral warranty. And in every caſe where one doth demand an eſtate tail, if any anceſtor of the iſſue in tail, whether he had poſſeſſion of the land or not, hath made a warranty, and if the iſſue, that were to bring a writ of formedon, may or might have, by poſſibility of ſome matter that might have been done, conveyed to himſelf a title by force of the gift by him that made the warranty; this is a lineal warranty. As if a man be ſeiſed of land of an eſtate tail to him and the heirs of his body begotten, and make a feoffment of it, and bind him and his heirs to warrant it, and hath iſſue and dieth; this warranty deſcending upon the iſſue is a lineal warranty (1). And if lands be given to one and the heirs males of his body, and for want of ſuch iſſue to the heirs females of his body, and the donee doth make a feoffment with warranty, and hath iſſue a ſon and a daughter and dieth; this warranty is lineal to the ſon, and if the ſon die without iſſue male, it is a lineal warranty from the father to the daughter. But if the brother in his life time releaſe to the diſcontinuee, *&c.* with warranty, *&c.* and after dieth without iſſue; this is a collateral warranty to the daughter. If lands be given to the huſband and wife, and the heirs of their two bodies engendred, and they have iſſue, and the huſband diſcontinue and die, and after the wife doth releaſe with warranty and die; this is a lineal warranty. And if lands be given to a man and a woman unmarried, and the heirs of their two bodies, and they intermarry, and are diſſeiſed, and the huſband doth releaſe with warranty, and dieth, and after the wife dieth; this is a lineal warranty to the iſſue for all the land. And if tenant in tail have iſſue three ſons and diſcontinue, and the middle brother doth releaſe with warranty, and die without iſſue, and after the father dieth, and after the elder brother dieth without iſſue, ſo that the warranty doth deſcend to the younger brother; this is a lineal

Co. ſuper Lit. 374.

Lit. Sect. 707.

* P. 191.

Co. 1. 66. 67.

Co 8. 52. New terms of the law tit. Warranty.

Lit. Sect. 719.

Lit. Sect. 714.

Co. ſuper Lit. 375.

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(1) *Lineal* warranty is that which is made by tenant in tail, *collateral* that which is made by a ſtanger to the intail.—ſee further in *Sull. ſect.* 165.

warranty

warranty to him. And if a father give land to his eldeſt ſon and the heirs males of his body, *&c.* the remainder to the ſecond ſon, *&c.* if the eldeſt ſon alien in fee with warranty, *&c.* and hath iſſue female, and dieth without iſſue male; this is a lineal warranty * to the ſecond ſon. And in all theſe caſes of a lineal warranty, if the right of the eſtate to be barred be the right of an eſtate in fee-ſimple, it is a bar without any aſſets; for the rule is, that as to him that demandeth fee-ſimple by any of his anceſtors, he ſhall be barred and bound by a lineal warranty that doth deſcend upon him, unleſs he be reſtrained by ſome ſtatute. But it doth not bind the right of an eſtate in fee-tail without aſſets, for in that caſe the rule is, that as to him that demandeth fee-tail by writ of formedon in the deſcender, he ſhall not be barred by a lineal warranty, unleſs he hath aſſets by deſcent in fee-ſimple of other land from the ſame anceſtor that made the warranty; and then it is a bar for ſo much only as doth deſcend to him no more. And yet if the iſſue in tail do alien the aſſets deſcended and die; in this caſe the iſſue of that iſſue is not barred by this warranty and aſſets. But if the iſſue, to whom the warranty doth deſcend, bring his writ of formedon, and is barred by judgement by reaſon of the warranty and aſſets; in this caſe albeit he alien the aſſets afterwards, yet the eſtate tail is barred for ever (1).

* P. 192.

Lit. Sect. 711. 712. Doct & St. 152. 153. Co. 8. 52.

Co. ſuper Lit. 393.

9. What ſhall be ſaid a collateral warranty: and how ſuch a warranty ſhall bar.

If tenant for life do alien in fee with warranty, or be diſſeiſed and releaſe to the diſſeiſor with warranty and die, and the warranty deſcend on him in reverſion or remainder; this is a collateral warranty (2). So if the leſſee for life be diſſeiſed, and a collateral anceſtor of him in reverſion, releaſe with warranty and die, and the warranty deſcend on him in reverſion; this is a collateral warranty, for that is collateral which is collateral to the title of the land. And if a man ſeiſed of lands in fee have iſſue two ſons, and the father dieth, and the younger ſon doth enter, and doth alien the land with warranty, and die without iſſue; this is now a collateral warranty that is deſcended on the elder brother. And if a ſon be diſſeiſed of his own land, and bring an aſſiſe, and after the father doth releaſe to the diſſeiſor with warranty and dieth; this warranty that doth deſcend to the ſon is a collateral warranty. And if a father diſſeiſe his ſon of the land he hath of his own purchaſe, without any intent to alien afterwards and to bar his ſon, and afterwards he doth make a feoffment with warranty and die before the entry of his ſon, ſo that the warranty doth deſcend; this is a collateral warranty. If there be father and two ſons,

Co. 1 67. 21 H. 7. 10. Lit. ſect. 725.

Lit. Sect. 707. Doct & St. 152.

21 H. 7. 10.

Lit. Sect. 704.

Lit. Sect. 707.

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(1) See further what may be deemed a lineal warranty, and how it ſhall bind, in *Bac. Abr.* Warranty (F.) *Com. Dig.* Garranty (H.) *Vin. Abr.* Voucher (W. b.) to (A. c.)

(2) Collateral warranty was where the heirs title to the land neither was, nor could have been, derived from the warranting anceſtor; as where a younger brother releaſed to his father's diſſeiſor with warranty; this was collateral to his elder brother, 2 *Bl. Com.* 302.—No reaſon can be given for a collateral warranty. *per cur.* 4 *Mod.* 211.—but *Holt* Ch. J. ſaid that the true reaſon of collateral warranty was the ſecurity of purchaſers, and for their encouragement; as alſo for the eſtabliſhing and ſettling the eſtates of ſuch as were in by title, or deſcent caſt; and this was the only ſecurity ſuch perſons could have at common law. And becauſe the eſtates of ſuch perſons, as are in by title, are much favoured in law, theſe covenants that were for ſtrengthening of them were favoured likewiſe. And in thoſe days there was no need of a lineal warranty; but however the force of that is taken away by the ſtatute of *Donis*; and common recovery is not upon the ſuppoſition of recompence in value, and never was within the ſtatute; but always as much out of it as if it were ſo mentioned by expreſs words. And this he ſaid was my Ld. *Hale's* opinion. 12 *Mod.* 512.—See further as to the reaſon and doctrine of collateral warranty in *Lull. Sect.* 121. 164. 2 *Inſt.* 335. *Wright's Ten.* 168.

leſſee

and the father is diſſeiſed, and the younger ſon doth releaſe with warranty to the diſſeiſor, and die without iſſue, and then the father dieth; in this caſe, the warranty now deſcended is a collateral warranty.

Co. ſuper Lit. 388.

If a leaſe be made for life to the father, the remainder to his next heir, and the father is diſſeiſed, and doth releaſe with warranty and dieth; this is a collateral warranty to the heir. And if the huſband diſcontinue * the right of his wife, and anceſtor collateral to the wife to whom ſhe is heir doth releaſe with warranty and die, and after the huſband dieth; this is a collateral warranty and a bar to her.

* P. 193.

Co. 10. 96. Lit. Sect. 709. Plow. 234. Kelw. 78.

And in every caſe where a man doth demand an eſtate tail by a writ of formedon, if any anceſtor of the iſſue in tail, which hath, or hath not poſſeſſion, maketh a warranty, and the iſſue that is demandant cannot by any poſſibility that may be done, convey to him a title by force of the gift, from and by him that made the warranty; this is a collateral warranty: as if tenant in tail diſcontinue the tail and die, having iſſue, and the uncle of the iſſue doth releaſe with warranty to the diſcontinuee, and die without iſſue, ſo that the warranty doth deſcend on the iſſue in tail; this is a collateral warranty. So if ſuch a diſcontinuee make a feoffment in fee, or be diſſeiſed, and the uncle releaſe with warranty to the diſſeiſor, or feoffee, and die without iſſue, and the warranty doth deſcend on the iſſue; this is a collateral warranty.

Lit. Sect. 708.

If a tenant in tail have three ſons, and diſcontinue the tail in fee, and the middle brother doth releaſe to the diſcontinuee with warranty, and after the tenant in tail dieth; this is a collateral warranty to the elder brother.

Lit. Lect. 716.

If one have iſſue three ſons, and giveth land to the eldeſt, and the heirs of his body, and for want of ſuch iſſue to the middle, and the heirs of his body, the remainder to the third, and the heirs of his body, and the eldeſt doth diſcontinue the tail in fee with warranty, and die without iſſue; this is collateral to the middle ſon. In the ſame manner it is in caſe where the middle ſon hath the ſame land by force of the ſame remainder, becauſe his elder brother made no diſcontinuance, but died without iſſue of his body, and after the middle brother doth make a diſcontinuance with warranty, *&c.* and dieth without iſſue; this is a collateral warranty to the youngeſt ſon. And in this caſe if any of the ſons be diſſeiſed, and the father that made the gift, *&c.* releaſeth to the diſſeiſor all his right with warranty; this is a collateral warranty to that ſon upon whom the warranty doth deſcend.

Co. 8. 52. Lit. Sect. 713.

If lands be given to *A.* and the heirs of his body, and for want of ſuch iſſue to *E.* his ſiſter, and the heirs of her body, and *A.* doth make a feoffment with warranty, and die without iſſue, having two ſiſters, *E.* and *S*; this is a collateral warranty to *E.*

Lit. Sect. 711.

If lands be given to a man and the heirs of his body begotten, who taketh a wife and hath iſſue a ſon by her, and the huſband doth diſcontinue the tail in fee and dieth, and after the wife doth releaſe to the diſcontinuee with warranty and dieth, and the warranty doth deſcend to the ſon; this is collateral to him.

If tenant in tail diſcontinue the tail in fee, and the diſcontinuee is diſſeiſed, and the brother of the tenant in tail doth releaſe to the diſſeiſor with warranty in fee, and dieth without * iſſue, and the tenant in tail hath iſſue and dieth; this is collateral as to the iſſue.

* P. 194.

If tenant in tail have iſſue two

daughters, and die, and the elder enter into all to her own uſe, and thereof make a feoffment in fee with warranty, and die without iſſue, this warranty as to the other ſiſters part is collateral, but not as to her own. If the husband and wife, tenants in ſpecial tail, have iſſue a daughter, and the wife die, and the huſband by a ſecond wife have iſſue another daughter, and diſcontinueth in fee and dieth, and a collateral anceſtor of the daughters releaſe to the diſcontinuee with warranty and dieth, and the warranty deſcend upon both the daughters, this is a collateral warranty to them. If lands be given to one and the heirs males of his body, and for want of ſuch iſſue to the heirs females of his body, and the father die, and the brother releaſe with warranty, and die without iſſue; this is collateral to the daughter. If tenant in tail make a leaſe for life, the remainder to another in fee, and a collateral anceſtor doth confirm the eſtate of tenant for life with warranty and die, and after the tenant in tail die, having iſſue; this is a good binding collateral warranty during the eſtate for life. And in all theſe and ſuch like caſes of a collateral warranty, whether the right be the right of an eſtate tail, or the right of an eſtate in fee ſimple that is to be barred, it is a bar without any aſſets; for in this caſe the rule is, that a collateral warranty is a bar to him that demandeth fee ſimple, and alſo to him that demandeth fee tail, without any other deſcent of lands in fee ſimple; ſo that the heir on whom the ſame warranty is deſcended, can never have the land ſo warranted, whilſt the warranty doth continue in force, but is bound thereby, except it be in ſome ſpecial caſes reſtrained by Act of Parliament; as where the huſband alone during his wife's life, or after her death, being tenant by the curteſy, make a feoffment by fine, or deed, of his wife's land, which ſhe hath by deſcent or purchaſe, with warranty; this will not bar her heir without aſſets of other lands in fee-ſimple deſcended from the ſame anceſtor that made the warranty. Or where a wife after her huſband's death, ſhall alone, or with her ſucceding huſband alien, releaſe, confirm, or diſcontinue with warranty, the land ſhe holdeth in dower, or in tail, of the gift of her former huſband, or any of his anceſtors; this warranty is voidable, and will not bind with aſſets (1).

Co. ſuper Lit. 373.

Lit. Sect. 738.

Lit. Sect. 712. Co. ſuper Lit. 374. Co. 10. 96. Stat. of Glouc. ch. 3. Co. ſuper Lit. 365. Stat. 11. H. 7. chap. 20.

10. What ſhall be ſaid a warranty that doth begin by diſſeiſin: and what ſuch a warranty doth work.

If the ſon purchaſe land, *&c.* and after let it to his father, or any other anceſtor for years, or at will, and he by his deed doth infeoff a ſtranger, and that with warranty, and after dieth, whereby the warranty doth deſcend upon the heir; this warranty

Lit. Sect. 699. 700. 701, 702. Finch 82. Co. ſuper Lit. 367.

(1) Such warranty by the ſtatute 11 *H.* 7. *c.* 20. made abſolutely *void*.—and by the ſtat. 4 *Ann. c.* 16. § 21. It is enacted "That all warranties which ſhall be made after the firſt day of Trinity Term 1705, by any "tenant for life, of any lands, tenements, or hereditaments, the ſame deſcending or coming to any perſon "in reverſion or remainder, ſhall be void and of no effect; and likewiſe all collateral warranties which ſhall be "made after the ſaid Trinity Term, of any lands, tenements, or hereditaments, by any anceſtor who has "no eſtate of inheritance in poſſeſſion in the ſame, ſhall be void againſt his heir".—It is a common miſtake, that *all collateral warranties are taken away by the ſtatute* 4 & 5 *Ann. c.* 16. whereas that ſtatute only makes void all warranties by tenant for life, and all collateral warranties made by any anceſtor, *not having an eſtate of inheritance in poſſeſſion:* So that if *A.* be tenant in tail, remainder to *B.* his next brother (which is a very common caſe, ariſing almoſt on every marriage ſettlement) and *A.* being in poſſeſſion makes a feoffment, or levies a fine with warranty from him and his heirs, and die without iſſue, this is a collateral warranty, (for *B.*'s title is by way of remainder, to which his elder brother is collateral) which ſhall bar *B.* not withſtanding the ſtatute, tho' no aſſets deſcend. *et ſic de ſimilibus. Robinſon* on Gavelk. 125. As to the operation of the ſtatute of *Ann.* ſee *Hawk. Abr. Co. Lit.* 7th edit. 468, 476. and further as to collateral warranty, and in what caſes it ſhall bar, in *Com. Dig.* Garranty (H. 2.) (H. 5.) *Bac. Abr.* Warranty (H.) *Vin. Abr.* Voucher (U. b. 3.)

ranty doth commence by diſſeiſin. So if tenant by elegit, ſtatute merchant, guardian in chivalry, or ſocage, or becauſe of * nurture, make a feoffment with warranty, and this warranty doth deſcend on his heir; this warranty doth commence by diſſeiſin. So if one that hath no right at all enter into my land, and make a feoffment to another with warranty. So if one coparcener enter into the whole land, and make a feoffment in fee with warranty; this warranty as to the one moiety doth begin by diſſeiſin. So if father and ſon purchaſe lands to them jointly, *&c.* and the father alien the whole to another with warranty, *&c.* and after the father dieth; this warranty as to the one moiety doth begin by diſſeiſin. But if the purchaſe be to them two and the heirs of the ſon it is otherwiſe, for if the ſon enter in the life time of the father, the warranty is avowed for all, but if he do not enter, then as to the father's moiety it is a collateral warranty. And if the purchaſe be to the father and ſon, and the heirs of the father, and the father alien with warranty, *&c.* in this caſe the warranty is good for the whole.

* P. 195.

Co. 5. 80. ſuper Lit. 366, 367.

If the father be tenant for life, the remainder to his ſon and heir in fee, and the father by covin and conſent, of purpoſe to bar the heir by a collateral warranty, maketh a leaſe for years, to the end that the leſſee ſhould make a feoffment in fee, that the father may releaſe to the feoffee with warranty, and all this is done accordingly, and the father dieth, and the warranty doth deſcend to the ſon; in this caſe, the warranty ſhall be ſaid to begin by diſſeiſin. But if the father in this caſe make a feoffment in fee with warranty and die; this is a good warranty to bind the ſon, albeit it is done of purpoſe to bar him. So if one brother make a giſt in tail to another, and the uncle doth diſſeiſe the donee, and infeoffeth another with warranty, the uncle dieth, and the warranty deſcendeth on the donor, and then the donee dieth without iſſue; this warranty doth begin by diſſeiſin. So if the father and ſon and a third perſon be jointenants in fee, and the father maketh a feoffment in fee of the whole, with warranty, and dieth, and then the ſon dieth; in this caſe, as to the part of the third perſon and to the part of ſon, the warranty ſhall be ſaid to begin by diſſeiſin. But releaſes at this day by a tenant for life, to a diſſeiſor, or any other, without covin, albeit it be to the intent to bar him in reverſion, ſhall bar him; for intent, without covin and diſſeiſin, ſhall not avoid a warranty: and examples of warranties that do begin by diſſeiſin, have theſe qualities: 1. That for the moſt part the diſſeiſin is done immediately to the heir that is bound by the warranty (1). 2. The warranty and diſſeiſin are *ſimul* and *ſemel*. And yet if a man diſſeiſe another with intent to make a feoffment with warranty, albeit the feoffment be made twenty years after the diſſeiſin, yet it ſhall be ſaid to be a warranty that doth begin by diſſeiſin. But in all theſe caſes of warranties that do begin by diſſeiſin, this is the rule, that * they are altogether void

* P. 196.

(1) And yet if the father be tenant for life, the remainder to the ſon in fee; the father, by covin and conſent, makes a leaſe for years, to the end that the leſſee ſhall make a feoffment in fee, to whom the father ſhall releaſe with warranty; and all is executed accordingly; the father dies; this warranty ſhall not bind, albeit the diſſeiſin was not done immediately to the ſon; for the feoffment of the leſſee is a diſſeiſin to the father, who is *particeps Criminis*. *Co. Lit.* 366. b.—See accordingly and further in *Vin. Abr.* Voucher (B. 4.) pl. 7. in margin where caſes are collected to ſupport this point of doctrine.

and

and without force as to all others but to the parties themſelves that do make them; and therefore they do not bar or bind any others at all of their right that have any. And the ſame law is of a warranty that doth begin by abatement or intruſion; that is, when an abatement or intruſion is made of purpoſe to make a feoffment in fee with warranty. And ſo alſo it is where the tenant dieth without heir, and an anceſtor of the Lord doth enter before the entry of the Lord, and make a feoffment in fee with warranty; in this caſe this ſhall not bind the Lord, becauſe it doth begin by wrong (1).

11. How a warranty ſhall be taken.

All warranties in general are favourably taken in law, becauſe they are part of men's aſſurances. Every warranty in law is taken for, and hath the effect of, a lineal warranty.

The warranty that is made by *Dedi & Conceſſi*, or *Dedi* only in a feoffment, is, and ſhall be taken for, a general warranty againſt all perſons to the feoffee and his heirs, during the life of the feoffor only, albeit there be no ſervice reſerved by the deed nor heir named: but it ſhall not extend to the aſſignee of the feoffee. And if there be any ſervice reſerved on the deed, then it ſhall extend againſt the heir alſo. Co. 4. 81. 5. 17.

The warranty in law that is made upon a gift in tail, or leaſe for life, rendring rent, is a ſpecial warranty againſt the donor and leſſor, and his heirs and aſſigns; ſo that the donee or leſſee may vouch the grantor after the grant of the reverſion, or the grantee of the reverſion after the atturnment of the tenant, at his election. Co. 4. 81. ſuper Lit. 384.

The warranty in law that is made upon an exchange, is ſpecial in divers reſpects; for it extendeth reciprocally to, and againſt, the heirs of both parties; and it doth extend only to the ſame land that is given in exchange, and none other; and no uſe can be made of it but by voucher, for no *warrantia chartæ* doth lie upon it. So alſo the warranty, that is made in dower, is taken to extend only to the other two parts of the land. Co. 4. 121. ſuper Lit. 384.

The warranty in law, that is made upon the tenure of homage anceſtrel, extendeth reciprocally to the heirs, and againſt the heirs, of both parties. Co. ſuper Lit. 384.

If a feoffment be made of land to three jointly, and the feoffors do warrant the land to the feoffees, and every of them; this warranty ſhall be joint and not ſeveral. But if the eſtate be ſeveral, as if one grant white acre to *A.* and black acre to *B.* and grant to warrant the land to them, and either of them; in this caſe the warranty ſhall be ſeveral. Co. 5. 59.

If a man of full age, and an infant join in a feoffment with warranty; this ſhall be taken for a good warranty as to the whole for him that is of full age and void for the infant, and not void in part and good in part. Co. ſuper Lit. 367.

If a man make a feoffment in fee, and bind his heirs but not himſelf * to warranty; in this caſe and by this, his heirs ſhall not be bound, and it ſeems alſo that it will not bind the warrantor himſelf. But if a man bind himſelf to warrant, and not his heirs, by the feoffment; in this caſe the feoffor himſelf is bound to the warranty, but not his heirs; for it is a maxim of law, that the heir ſhall never be bound to any expreſs Co. ſuper Lit. 386. Co ſuper Lit. 47. 385. Dier 42. Kelw. 108. Co. 6. 69.

* P. 197.

(1) See more amply what ſhall be deemed warranty which commences by diſſeiſin, abatement, or intruſion, and their operation, in *Bac. Abr.* Warranty (K.) *Com. Dig.* Garranty (I. c.).

warranty,

warranty, but where the anceſtor was bound by the ſame warranty. If one make a feoffment to *B.* and his heirs, and thereby doth grant to warrant the land, and doth not ſay to *B.* and his heirs; yet this warranty ſhall be taken to extend to them. But if the feoffor doth grant to warrant the land to *B.* and doth not ſay to his heirs, this ſhall not extend to his heirs. And if in this caſe the warranty be to *B.* and his aſſigns, it ſhall not extend to his heirs, neither ſhall the aſſignees take advantage of it after the death of *B.* And if the warranty be to *B.* and his heirs, and not to his aſſigns alſo; this ſhall not extend to his aſſigns. If one make a feoffment to *A. habendum* to him and his heirs, and bind himſelf and his heirs to warrant the land *in formâ prædictâ*; in this caſe the warranty ſhall extend to the feoffee and his heirs (1).

Co. 1. 1. If one grant to warrant land to another and his heirs, and doth not ſay againſt what perſons, this ſhall be taken for a general warranty againſt all men.

If one make an eſtate and grant to warrant the land, but doth not ſay how long, this ſhall be taken for as long as the eſtate to which the warranty is knit doth laſt.

Dier 328. If a warranty be made againſt any ſpecial perſons, it ſhall extend to them and no further; and it ſhall extend in all caſes for and to all titles and entries upon title; and it ſhall not in any ſuch caſes extend to tortious and unlawful entries.

Co. ſuper Lit. 366. If a man be ſeiſed of a rent-ſeck, iſſuing out of the manor of *Dale*, and he take a wife, and the husband doth releaſe to the terre-tenant, and warranteth *tenementa prædicta* and dieth; this warranty ſhall extend to the rent, as well as to the land; and therefore if the wife ſue for her thirds of the rent, the terre-tenant may vouch the heir.

Co. ſuper Lit. 388, 389. And regularly the warranty doth extend to all things iſſuing out of the land, *viz.* to warrant it in the ſame manner and plight as it was in the hands of the feoffor, and he ſhall vouch as of lands diſcharged. And therefore if grantee of a rent, grant it to the tenant of the land on condition, and the tenant doth make a feoffment of the land with warranty; in this caſe the warranty ſhall not extend to the rent, albeit the feoffment be made of the land diſcharged of the rent. And if a woman have a rent-charge in fee, and ſhe doth intermarry with the tenant of the land, and a ſtranger doth releaſe to the tenant of the land with warranty; this warranty ſhall not extend to bar any action to be brought after the death of the wife for the rent. But if in this caſe the * tenant make a feoffment in fee with warranty and dieth, * P. 198.

(1) In the caſe of *Williamſon* v. *Codrington* in 1 *Veſ.* 511. Sir *W. C.* made a voluntary ſettlement of a plantation in *America*, with a clauſe, whereby *he obliged himſelf, his heirs, executors, and adminiſtrators, to warrant and for ever defend the plantation, negroes, cattle, ſtock, &c.*—The word *warrant*, when properly applied, has to be ſure a particular ſenſe; but has in general a further ſenſe: therefore it is not neceſſary to underſtand *warranty* in a deed or covenant barely as a warranty of the title to the realty: But it ſhall be taken *ſecundum ſubjectam materiam.* Here are chattles to be warranted in this deed; ſome of which are certainly perſonal things, as cattle, horſes, *&c.* though negroes in ſome inſtances are conſidered as annexed to the plantation. Then there are words binding his executors, and adminiſtrators; which muſt be rejected, if to be conſtrued as a mere real warranty of the land. This clauſe therefore is inconſiſtent with that narrow conſtruction: nor is it penned as a real warranty; which is, "I do for my ſelf and my heirs warrant ſuch land;" here the words are, "I do oblige," *&c.* which amounts to the ſame as, "I covenant," *&c.* for many other words in a deed will amount to a covenant beſides the word *covenant*; as "I oblige, agree." This then is barely a covenant for himſelf, his heirs, executors, and adminiſtrators, to warrant; which word muſt be conſtrued in a larger ſenſe than warranty in a ſtrict legal ſenſe, as large as *defend.* That conſtruction a court of law or equity muſt put on it. *per* Ld. *Hardwicke*, 1 *Veſ.* 516.

the feoffee in a *cui in vita* brought by the wife ſhall vouch as of lands diſcharged at the time of the warranty made. So if tenant in tail of a rent-charge purchaſe the land and make a feoffment with warranty, and the iſſue bring a formedon of the rent, the tenant ſhall not vouch, *&c.* (1)

12. Who may take advantage of a warranty; and how and againſt whom it may be taken. Aſſignes.

All thoſe that are parties to the warranty, *i. e.* ſuch as are named in the deed regularly, ſhall take advantage of the warranty: as if one doth warrant land to another, his heirs, and aſſigns; in this caſe both the heirs and the aſſigns may take advantage of it, and they both may vouch or rebut, or have a *warrantia chartæ*, ſo as they come in in privity of eſtate; for otherwiſe the heirs or aſſigns cannot vouch, or have a *warrantia chartæ*; and yet they may rebut, notwithſtanding, in divers caſes. But thoſe that are not named, for the moſt part, ſhall not take advantage of the warranty: and therefore if land be warranted to *I. S.* and not to him and his heirs, or to him and his aſſigns, or to him, his heirs and aſſigns; in theſe caſes neither the heir nor the aſſignee may vouch or have a *warrantia chartæ*; and yet in ſome caſes where it is ſo, the aſſignee or tenant of the land may rebut. Co. ſuper Lit. 365. 5. 17.

The warranty annexed to an exchange, a partition, by *Dedi*, and by homage anceſtrel, doth always go in privity; and therefore an aſſignee in theſe caſes can take no advantage of it. And yet in the caſes of exchange and *Dedi*, an aſſignee may rebut. But the aſſignee of a leſſee for life may take advantage of the warranty in law annexed to his eſtate. Co. ſuper Lit. 384.

If one grant to warrant land to another, his heirs and aſſigns; in this caſe the heirs, or aſſigns, heir of the aſſignee, or aſſignee of the heirs of the feoffee, or aſſignees of aſſignees *in infinitum*, ſhall take advantage of the warranty. And therefore if one infeoff *I. S.* to have and to hold to him, his heirs and aſſigns, and warrant the land to him, his heirs and aſſigns, and *A.* doth infeoff *B.* and his heirs, and *B.* dieth; in this caſe the heir of *B.* ſhall vouch as aſſignee to *A.* And if one infeoff *A.* and *B. Habendum* to them and their heirs, and warrant the land to them, their heirs and aſſigns, and *A.* die, and *B.* doth ſurvive and die, and his heir infeoff *C.* in this caſe *C.* ſhall take advantage of this warranty as aſſignee. If one infeoff *A.* with warranty to him, his heirs and aſſigns, and *A.* doth infeoff *B.* and *B.* doth reinfeoff *A.* In this caſe neither *A.* nor his aſſigns ſhall ever take any advantage of this warranty. And yet if *B.* infeoff the heir of *A.* he may take advantage of the warranty. Co. 5. 17. ſuper Lit. 384. 385.

If one make a feoffment by deed with warranty to the feoffee, his heirs and aſſigns, and the feoffee doth make a feoffment over to another by word without deed; in this caſe the ſecond feoffee ſhall * have all the advantage of this warranty, for an aſſignee by word ſhall have the ſame advantage that an aſſignee by deed ſhall have.

* P. 199.

If a feoffment be made with warranty to a man and his heirs and aſſigns, and he make a gift in tail, the remainder in fee, and the donee make a feoffment in fee; this feoffee ſhall not

(1) See further as to the operation of warranties, what rights and titles are barred by them, and how they ſhall be expounded and taken, in *Vin. Abr.* Voucher (B. 7.) *Bac. Abr.* Warranty (P.) *Com. Dig.* Garranty (F.)

vouch as aſſignee, but he muſt vouch his donor upon the warranty in law; and yet he may rebut.

If lands be given to two brethren in fee ſimple, with warranty to the eldeſt and his heirs, and the eldeſt dies without iſſue; in this caſe, albeit the other brother be his heir, yet he ſhall have no advantage at all by the warranty, becauſe he comes in above the warranty. But generally all that claim under the warranty ſhall take advantage thereof by way of rebutter, albeit they can take no other advantage by it.

If one make a feoffment to two their heirs and aſſigns, and one of them doth make a feoffment in fee, this feoffee in this caſe ſhall not take advantage as aſſignee.

Co. ſuper Lit. 385. An aſſignee of part of the land ſhall take advantage of a warranty, as if a man make a feoffment of two acres with warranty to him, his heirs and aſſigns, and the feoffee doth make a feoffment of one acre of it to another; in this caſe the ſecond feoffee ſhall take advantage of the warranty as aſſignee. And therefore herein there is a difference between the whole eſtate in part, and part of the eſtate in the whole or in any part: for if a man have a warranty to him, his heirs and aſſigns, and he make a leaſe for life, or gift in tail; in theſe caſes the leſſee or donee ſhall not take advantage of the warranty as aſſigns: but they may vouch the leſſor, or donor, upon the warranty in law. Co. ſuper Lit. 384. But if a leaſe for life be made, the remainder in fee; ſuch a leſſee may vouch as aſſignee upon the firſt warranty. If the father have a feoffment made to him and his heirs with warranty, and he make a feoffment to his ſon and heir with warranty; in this caſe the ſon may take advantage of the firſt warranty after his father's death. Co. ſuper Lit. 390. If a man infeoff a woman with warranty, and they intermarry and are impleaded, and upon the default of the huſband the wife is received; in this caſe ſhe may vouch her huſband. *Et ſic e converſo.* If a woman infeoff a man with warranty, and they intermarry and are impleaded: the huſband in this caſe ſhall vouch himſelf and the wife.

26 H. 8. 3. 22 Aſſ. pl. 37. 29 Aſſ. 34. Co. 3. 62. 63. He that comes into the land merely by act of law in the poſt, as the Lord by eſcheat, or the like, ſhall never take advantage of a warranty: and therefore if tenant in dower infeoff a villain with warranty, and the Lord of the villain enter; or a feoffment be to a baſtard with warranty, and he die without iſſue, and the Lord enter by eſcheat; in theſe caſes the Lord ſhall never take advantage of theſe warranties. But otherwiſe it is where a * man comes to the land by limitation of uſe, or a common recovery, which is by the act of the party: for if tenant in tail, being in of another eſtate, *i. e.* by diſſeiſin, or feoffment of a diſſeiſor, ſuffer a common recovery, and a collateral anceſtor of the tenant in tail doth releaſe with warranty to the recoveror, and after the recoveror doth make a feoffment to uſes which are executed by the ſtatute of 27 *H.* 8. and after the collateral anceſtor dieth, in this caſe the terre-tenants may take advantage of the warranty by way of rebutter, albeit the eſtate be transferred in the poſt. So if he to whom the warranty is made, ſuffer a common recovery, and after the anceſtor dieth; the recoveror may take advantage of this warranty by way of rebutter: for any man that hath the poſſeſſion of land, albeit he have no deed to ſhew how he came by the poſſeſſion of it, or how he is aſſignee, may rebut the demandant, and ſo bar

* P. 200.

bar him, and defend his own poſſeſſion: and therefore the tenant by the curteſy, donee in tail that is in of another eſtate, an aſſignee by force of a warranty made to a man and his heirs, or feoffee of a donee in tail, may rebut and bar the demandant by the warranty.

If one infeoff another of an acre of ground with warranty, and hath iſſue two ſons, and dieth ſeiſed of another acre of land of the nature of borough Engliſh; in this caſe, albeit the warranty deſcend upon the eldeſt ſon only, yet both the ſons may be vouched. And ſo alſo it is of heirs in gavelkind; the eldeſt ſhall be vouched as heir to the warranty, and the reſt in reſpect of the inheritance (1). And in like ſort the heir at the common law, and the heir of the part of the mother ſhall be vouched, or the heir at the common law may be vouched alone, at the election of the tenant. And in like ſort the heir at the common law ſhall be vouched with the heir in borough Engliſh. And ſo alſo a baſtard ſhall be vouched with a *mulier* (2). And if a man die ſeiſed of certain lands in fee, having iſſue a ſon and a daughter by one venter, and a ſon by another, and the eldeſt ſon entreth and dieth, and the land doth deſcend to the ſiſter; in this caſe the warranty doth deſcend on the ſon, and he may be vouched as heir, and the ſiſter alſo may be vouched as heir to the land.

Co. ſuper Lit. 376. 1 Ed. 3. 13. 5 H. 7. 2.

If two make a feoffment with warranty, and the one die, the ſurvivor ſhall not be charged alone with the warranty, but the heir of him that is dead ſhall be charged alſo. And if two be bound to warrant land, and both of them die; the heirs of both of them ought to be vouched, and ſhall be equally charged. And if the heir be vouched in the ward of three ſeveral perſons, the one of them only ſhall not be charged, but they ſhall be charged equally.

Co. 3. 14. ſuper Lit. 386. 16 H. 7. 13. 48 Ed. 3. 5.

If a woman, an heir of the diſſeiſor, infeoff me with warranty, and after ſhe is married to the diſſeiſee; in this caſe, I may take advantage of * this warranty againſt the diſſeiſee, and rebut him upon it, if he ſue me for the land. So if the huſband and wife ſue me for the land of his wife, and I have a warranty of a collateral anceſtor of the huſband's deſcended to him; in this caſe I may make uſe of this to bar the huſband and wife (3).

Co. ſuper Lit. 365.

* P. 201.

13. When a warranty ſhall be ſaid to be defeated, determined, or avoided: and how: or not.

A warranty lineal or collateral may be defeated, determined, or avoided in all, or in part. And this is ſometimes by matter in law, and ſometimes by matter in deed.

Co. ſuper Lit. 392. 393.

If the eſtate to which the warranty is annexed be gone, the warranty annexed thereunto is gone alſo. And therefore if an

Co. 10. 96. 1, 2, 3, 62, Lit. Sect. 741.

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(1) Concerning warranties annexed to gavelkind lands, it is ſaid generally in ſeveral books, that every warranty which deſcends, deſcends to him that is heir by the common law. *Co. Lit.* 12. a. 376. a. *Hob.* 31. *Cro. Jac.* 218. but for the better underſtanding this rule with the proper reſtrictions, *Mr. Robinſon* in his treatiſe on gavelkind p. 123, conſiders the authorities which treat more diſtinctly of this matter, under three heads; firſt, whether the younger ſons, heirs in gavelkind, may take advantage of a warranty annexed to their eſtate: 2. Whether they ſhall be barred or rebutted by the warranty of their anceſtor: 3. Whether they may be vouched by reaſon of ſuch warranty.

(2) The baſtard may be vouched alone without the *mulier*, becauſe the baſtard is heir in appearance and ſhall not diſable himſelf, *Co. Lit.* 376. b. Where a man has baſtard *eigne & mulier puiſne* and the baſtard enters, a man ſhall vouch the *mulier* as heir at the common law, and ſhew how the baſtard has entered into certain land of the father who made the warranty, and vouch him by the poſſeſſion. *Br. Abr.* Voucher, *pl.* 119. cites 22 E. 4. 10. See further *Vin. Abr.* Voucher (U.)

(3) See accordingly and further who may take advantage of a warranty, againſt whom, and in what manner, in *Bac. Abr.* Warranty (N.) *Com. Dig.* Garranty (C.) (K.) *Vin. Abr.* Voucher (I.)

eſtate

Co. ſuper Lit. 392. eſtate tail, to which a warranty is annexed, be ſpent, the warranty is determined. And if a man make a gift in tail with warranty, and after the donee doth make a feoffment, and die without iſſue, the warranty is gone. So if tenant in tail diſcontinue the tail, and the diſcontinuee be diſſeiſed, or make a feoffment on condition, and a collateral anceſtor of the iſſue releaſe to the diſſeiſor or feoffee, on condition, with warranty, and after the diſcontinuee doth enter upon the diſſeiſor, or on the feoffee for the condition broken; in theſe caſes, the warranty made by the collateral anceſtor is gone. So if a ſeigniory be granted with warranty, and the tenancy eſcheat, ſo that the ſeigniory is extinct; hereby alſo the warranty is defeated. So if a collateral anceſtor heretofore had releaſed with warranty, and then had entred into religion, this warranty had bound; but if after, he had been dearaigned, the warranty had been defeated.

Co. ſuper Lit. 384. Bro. Garranty, 27. If the father make a feoffment to his ſon and heir apparent, with warranty, and die, ſo that the warranty doth deſcend upon the ſon; hereby the warranty is gone. And yet if a feoffment be made to a man and his heirs, and he dieth leaving iſſue daughters: in this caſe the warranty ſhall be divided, and is not determined.

Lit. Sect. 743. Co. ſuper Lit. 390. Lit. Sect. 744. If tenant in tail doth make a feoffment to his uncle, and after the uncle doth make a feoffment in fee with warranty, *&c.* to another, and after the feoffee of the uncle doth reinfeoff again the uncle, and after the uncle doth infeoff a ſtranger in fee without warranty, and dieth without iſſue, and the tenant in tail dieth; hereby the warranty made to the firſt feoffee is defeated. So if the uncle make the warranty to the feoffee, his heirs and aſſigns, and take back an eſtate in fee, and after doth infeoff another. But if one make a feoffment with warranty to the feoffee, his heirs and aſſigns, and the feoffee doth reinfeoff the feoffor and his wife, or the feoffor and a ſtranger; in theſe caſes the warranty is not defeated, but doth continue ſtill. So if two do make a feoffment with warranty to one, his heirs and aſſigns, and the feoffee doth reinfeoff one of the feoffors; in this caſe the warranty is not gone. And if in the firſt caſe the feoffee make an eſtate to his uncle in tail, or for * life, ſaving the reverſion; or a leaſe for life, the remainder over, *&c.* in this caſe, the warranty is only ſuſpended. * P. 202.

Co. ſuper Lit. 391. If one make a feoffment or releaſe with warranty, and after is attainted of treaſon or felony; hereby the warranty is gone; and albeit he do afterwards obtain his pardon, yet the warranty is not revived.

Co. 6. 12. If a feoffment with warranty be made to two, or more, and they being jointenants do after by deed make partition; by this the warranty is determined (1). So if two jointenants be, and one of them diſſeiſe the other, and he that is diſſeiſed doth recover in an aſſiſe and hath judgement to hold in ſeveralty; hereby the warranty is determined. So if *A.* and *B.* be jointenants of white acre for life, and *A.* by fine doth grant to *B.* *totum & quicquid habet in tenementis*; hereby the warranty is gone. But if a partition be made by judgement upon a writ by

Adjudged Hil. 22 Jac. B. R. Euſtace & Shole's caſe.

(1) S. P. in *Hob. Rep.* 25, *Roll* v. *Oſborn*, and S. C. cited *per cur.* in the caſes of *Hawkins* v. *Cardy* in 1 Ld. *Raym.* 360. and 1 Salk. 65.

force of the ſtatute of 13 *H.* 8. this doth not defeat the warranty fallen to them; but it ſhall be divided between them, and they ſhall all of them take advantage of it.

If one infeoff three with warranty to them and their heirs, and one of them releaſe to one of the other two; hereby the warranty is gone for that part. But if one of them releaſe to the other two; in this caſe the warranty is not gone, but doth continue, and they may vouch upon it. Co. ſuper Lit. 385.

If one infeoff two men and their heirs with warranty, and one of them doth make a feoffment in fee; hereby the warranty is not determined, but the other may take advantage of it notwithſtanding. Co. ſuper Lit. 385.

Releaſe.

If the party that hath the warranty, or the eſtate to which the warranty is annexed, releaſe, to him that is bound to warrant, all warranties, or all covenants real, or all demands; by either of theſe releaſes the warranty is gone. Co. ſuper Lit. 393. 392. Lit. Sect. 748.

Defeaſance.

So alſo if by a defeaſance, made between the parties, it be agreed the warranty ſhall be void; by this defeaſance the warranty may be avoided alſo. Or if it be ſo agreed that the warrantee or his heirs, *&c.* ſhall not vouch, or have a *warrantia charta*; by this the warranty is avoided in part.

If tenant in tail doth infeoff his uncle, who doth infeoff another in fee with warranty; if in this caſe the feoffee releaſe the warranty to his uncle, hereby the warranty is extinct. But if a gift in tail be made with warranty, in this caſe, a releaſe made by the tenant in tail of this warranty, will not extinguiſh it. Co ſuper Lit. 391.

If the parties, between whom the warranty is, intermarry; hereby the warranty is ſuſpended during the coverture in ſome caſes. Co. ſuper Lit. 390.

If tenant in tail doth make a feoffment in fee with warranty, and diſſeiſeth the diſcontinuee, and dieth ſeiſed, this doth ſuſpend the warranty. Co. ſuper Lit. 330.

If two make a feoffment in fee, and warrant the land to the * feoffee and his heirs, and the feoffee doth releaſe the warranty to one of the feoffors; this doth not determine the warranty of the other as to the moiety. So if one doth infeoff two with warranty, and the one of them doth releaſe the warranty; this doth not extinguiſh the warranty for the other moiety, but it doth continue ſtill. Co. ſuper Lit. 393.

* P. 203.

A warranty alſo may loſe its force by taking benefit or making uſe thereof; for after a man hath once taken advantage thereof, in ſome caſes he can make make no further uſe of it: of which read *Co. ſuper Lit.* 393 (1).

And now having done with deeds in general, and ſome of the parts thereof in ſpecial, we are in order to come to ſome ſpecial kinds of deeds; wherein we will firſt begin with a deed of Feoffment.

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(1) See further in what caſes a warranty ſhall be ſuſpended, determined, defeated, or avoided, in *Bac. Abr.* Warranty (O.) *Com. Dig*, Garranty (I. 3.) 2 *Roll. Abr.* 740. *Vin. Abr.* Voucher (C. 6.)

CHAP. IX.

CHAP. IX.

Of a Feoffment.

1. Feoffment. *Quid.*

New terms of the law Co. ſuper Lit. 9. Lit. Sect. 57.

Feoffamentum, i. e. *Donatio feodi*, ſtrictly and properly is the gift or grant of any honors, caſtles, manors, meſſuages, lands, houſes, or other corporeal immovable things of like nature, which be hereditable to another in fee ſimple, *i. e.* to him and his heirs for ever, by the delivery of ſeiſin and poſſeſſion of the thing given. And from hence comes the word *infeoff*; for by this word and the words *give* and *grant*, (as the moſt apt words for that purpoſe) is this kind of conveyance moſt commonly made (1). Hence alſo it is, that he that makes this feoffment is called the feoffor; and he to whom it is made, the feoffee. Alſo it is ſometimes, but improperly, called a feoffment when an eſtate of freehold only doth paſs.

Inſeoff.

Feoffor. Feoffee.

2 *Quotuplex.*

See Weſt Sym. 1. part. Sect. 235. Co. ſuper Lit. 6.

This kind of conveyance albeit it may be made in moſt caſes by word without any writing, yet is moſt commonly done by writing; and this writing is then called a deed or charter of feoffment: but hence is the diviſion of a feoffment by word, or a feoffment by writing. The ancient forms and examples of theſe deeds are very brief; and yet they had theſe parts contained in them. 1. The premiſſes. 2. The *Habendum*, 3. The *Tenendum*. 4. The *Reddendum*. 5. The clauſe of warranty. 6. The *in cujus rei teſtimonium*. 7. The date. 8. The clauſe of *Hiis teſtibus*. *Hæc fuit candida illius ætatis fides & ſimplicitas, quæ pauculis lineis omnia fidei firmamenta poſuerunt* (2).

3. The nature and operation of it.

Co. ſuper Lit. 49. 9. Co. 1. 111. 112. Plow. 554. 9 H. 7. 24. 39 H. 6. 43. Co. ſuper Lit. 237. Perk. Sec. 210. 24 E. 3. 70. Co. 1. 121. Co. 6. 70. Bro. ſcire facias 88. Plow. 423. 424.

And this manner of conveyance, as it is the moſt ancient kind of conveyance, ſo is it the beſt and moſt excellent of all others, and in ſome reſpects doth excel the conveyance by fine or recovery: for it is of that nature and efficacy, by reaſon alſo of the livery of * ſeiſin evermore inſeparably incident to it, that it cleareth all diſſeiſins, abatements, intruſions, and other wrongful and defeaſible titles, and reduceth the eſtate clearly to the feoffee, when the entry of the feoffor is lawful, which neither fine, recovery, nor bargain and ſale by deed indented and inrolled will do, when the feoffor is out of poſſeſſion (3). And it paſſeth the preſent eſtate of the feoffor, and not only ſo, but barreth and excludeth him of all preſent and future right, and poſſibility of right, to the thing which is ſo conveyed: inſomuch that if one have divers eſtates, all of them paſs by his feoffment; and if he have any intereſt, rent, common, or the like into or out of the land, it is extinguiſhed and gone

* P. 204.

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(1) *Feoffment* is derived of the word of art *feodum*, *quia eſt donatio feodi*, for the ancient writers of the law called a feoffment *donatio*, of the verb *do* or *dedi*, which is the apteſt word of feoffment.—*Co. Lit.* 9. a.—A feoffment originally ſignified the grant of a feud or fee: that was the original and proper notation of the word: nevertheleſs by cuſtom it came afterwards to ſignify a grant (with livery of ſeiſin) of a free inheritance, to a man and his heirs; reſpect being had rather to the perpetuity of the eſtate granted, than to the *feodal* tenure. *Mad. Form. Angl. Diſſert.* p. 4.

(2) For various precedents of feoffments, ſee *Mad. Form. Angl.* 174 to 216.

(3) To make a feoffment good and valid, nothing is wanting but *poſſeſſion*, and where the feoffor has poſſeſſion, tho' it be ever ſo *bare* and *naked*, yet a freehold or fee-ſimple paſſes by it by reaſon of the livery. *Arg.* in 1 *Burr.* 92. referring to *Poph.* 39. *Lit.* §. 595. 599. 611. 618. *Co. Lit.* 366. b. 377. a.

by the feoffment. And farther, it barreth the feoffor of all collateral benefits touching the land, as condition, power of revocation, writs of error, attaint, and the like; inſomuch that if a man make an eſtate of his land upon condition, or with power to revoke it, and after he make a feoffment of the land; by this he is barred for ever of taking advantage of the condition, or power of revocation. It deſtroyeth contingent uſes, gives away a future uſe incluſively, gives away a ſeigniory incluſively, and gives away a right of action: for both the feoffment, and livery of ſeiſin incident thereunto, are much favoured in law, and ſhall be conſtrued moſt ſtrongly againſt the feoffor and in advantage of the feoffee. And beſides all this, becauſe it is ſo ſolemnly and publickly made, it is of all other conveyances moſt obſerved, and therefore beſt remembred and proved (1).

4. Who may make or take a feoffment: and what ſhall be ſaid a good feoffment: or not; and what things are requiſite thereunto.

1. In reſpect of the perſons thereunto and the quality of their eſtate.

If the feoffment be made by deed then muſt the deed be ſo made, written, read, ſealed, and delivered, as all other deeds that are well made muſt be. For which ſee *deed ſupra, cap.* 4. *numb.* 5. See Grant Numb. 4. Co. ſuper Lit. 2. 42. 43.

And in every good feoffment that is made there muſt be a feoffor, *i. e.* a perſon able to grant the thing paſſed by the feoffment; a feoffee, *i. e.* a perſon capable of it and able to take it, and a thing grantable, and it muſt be granted in that manner as law requireth. And for this therefore obſerve, that whoſoever is diſabled by the common law to take, is diſabled alſo to make, a feoffment, gift, grant, or leaſe; and many alſo that have capacity to take by ſuch conveyances have no ability to grant them; as men attainted of treaſon, felony, or in a premunire, aliens born, the King's villains, ideots, madmen, a man deaf, blind, and dumb, from his nativity, a feme covert, an infant, and a man by dureſs; for the feoffments, gifts, *&c.* of ſuch perſons may be avoided (2). But ſuch perſons as have committed treaſon or felony, if attainder do not follow, ſuch as are attaint of hereſy, a leper removed by the King's writ from the ſociety of men, baſtards, ſuch as are deaf, dumb, or blind, that have underſtanding and ſound memory, albeit they cannot expreſs their intentions otherwiſe than by ſigns, thoſe that are drunken, the villains of a common perſon, before entry, *&c.* alſo * excommunicate perſons, and outlawed perſons, albeit the King take the profits of their lands; all theſe may make feoffments, gifts, *&c.* and all theſe have capacity to take by ſuch conveyances. Perk. Sect. 182, 183, 185. Bro Feoffment 2. 7. 8. 9. 17. 39 H 6. 43. 21 H. 7. 7.

Aliens.

Idiots.

Feme covert.

Infant.

Attaint perſons.

* P. 205.

Outlawed perſons.

Feme covert.

A woman that hath a huſband, alone and by herſelf without her huſband, cannot make a feoffment of her own land, and if ſhe do ſo, it is void, albeit her huſband agree to it. Perk. Sect. 185, 186.

Corporation.

Neither the head alone, nor any one, or more, of the members of a corporation aggregate of many, alone, may make a feoffment of any of the land belonging to their corporation. But all of them together may make a feoffment: and if any of them be ſeiſed of land in his own right, and in his natural capacity, he may make a feoffment of this land as another man may do; yea he may make a feoffment of this land to the ſame corporation whereof he is a head or member, and ſo give and take alſo in a divers capacity. Fitz. faits & feoffments 29. Perk. Sect. 205, 224, 225.

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(1) See accordingly 2 *Bl. Com.* 310. and further as to the origin nature and operation of a feoffment *Spel. Gloſſ.* 510 *Wrights Ten.* 22. 48.—2 *Inſt.* 110. 119.—*Dalrymple* on Feuds 202.—The conveyance by feoffment is now very little in uſe: ſee the note at the end of this chapter.

(2) See before in page 54. and the references in note 2 thereunto

Eccleſiaſtical

Co. ſuper Lit. 43.

Eccleſiaſtical perſons cannot make feoffments, gifts, &c. of their eccleſiaſtical lands for longer time than three lives, or twenty one years; for all feoffments, gifts, grants, and leaſes by Biſhops albeit they be confirmed by Dean and Chapter, or by any of the colledges or halls in either of the univerſities or elſewhere, or by Deans and Chapters, maſters or gardians of any hoſpitals, Parſons, Vicars, or any other having ſpiritual or eccleſiaſtical living, are avoidable (1). Eccleſiaſtical perſons.

Perk. Sect. 194.

A man cannot make a feoffment to his own wife after the marriage is conſummate. But after a contract made, and carnal knowledge had, he may make a feoffment to her, and ſuch a feoffment will be good (2). Huſband and wife.

Perk. Sect. 197. Fitz. faits & feoffments 26.

One jointenant cannot make a feoffment of his part of the land to his companion, for a man cannot give a poſſeſſion to him that hath it before. And hence it is alſo that the leſſor cannot make a feoffment to his leſſee for life, years, or at will. And yet perhaps a feoffment in this caſe if it be in writing may work as a confirmation. But one tenant in common, or one coparcener may make a feoffment of his part of the land to his companion (3). Jointenants. Tenants in common.

Bro. feoffment 4. Perk. Sect. 222.

If a man make a feoffment of another's land, it is a diſſeiſin, but a good feoffment againſt all men but the diſſeiſee himſelf. And if four join in a feoffment of land, and three of them have nothing in the land, and the fourth hath all the eſtate; this is a good feoffment. Diſſeiſor and diſſeiſee.

Perk. Sect. 197. Co. ſuper Lit. 48, 49.

A diſſeiſor cannot make a feoffment of the land to the diſſeiſee, but it will be void, for the diſſeiſee will be remitted. But a diſſeiſee may make a deed of feoffment and a letter of attorney to enter and give livery; and if the attorney do ſo, this will be a good feoffment.

Fitz. faits & feoffments 21.

No feoffment, or livery of ſeiſin can be made to the King, for he doth always give and take by matter of record (4). Prerogative.

Co. ſuper Lit. 49. 21 H. 7. 7. See infra at Numb 9. Grant 5.

A feoffment may be made at this day of any thing which doth * lie in livery, by whatſoever tenure it be held, notwithſtanding the ſtatute of *Magna charta cap.* 32. But in ſome caſes where a man doth alien his land held of the King, he muſt have the King's licence before hand to do it, or elſe he muſt pay a fine to the King afterwards for not having a licence. But of ſuch things whereof no livery of ſeiſin can be made, no feoffment can be made. 2. In reſpect of the matter whereof it is made.

* P. 206.

Co. ſuper Lit. 190.

One may make a feoffment of a moiety, third, fourth, or fifth part of his manor or other land, and that by the name of a moiety, third, or fourth part (5).

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(1) If they exceed three lives or twenty-one years, under the ſtatute of 13 *Eliz. c.* 10. See further poſt, in the chapter on Leaſes.

(2) Though a huſband cannot convey to his wife *immediately*, yet he may give to a truſtee for her benefit, and the gift will be good. Therefore he may convey land to her by way of uſe, as by enfeoffing or covenanting with another to ſtand ſeiſed, or ſurrendring a copyhold eſtate to her uſe. And according to ſome books, by cuſtom of a particular place, as of *York*, the wife may take by *immediate* conveyance from her huſband. See *note* 1 to *Co. Lit.* 3. a. 13th. edition, and *Co. Lit.* 112. a.

(3) The proper conveyance by one joint tenant to another, and what will moſt effectually ſever the jointtenancy, is a releaſe; for one joint-tenant cannot *infeoff* his companion, becauſe they are both already ſeiſed *per mie & per tout*; and this manner of conveyance paſſing by livery, cannot operate ſo as to give him what he already has; but tenants in common have ſeveral diſtinct freeholds and may *infeoff* each other, but cannot releaſe to each other, for a releaſe ſuppoſeth the party to have the thing in demand. *Co. Lit.* 193. 200. b.

(4) See more amply who may make a feoffment, and to whom, in 4 *Co.* 125. 8 *Co.* 42. b. *Bac. Abr.* Feoffment (D.) 1 *Wood* 499. *Vin. Abr.* Feoffment (E).

(5) Feoffment by tenant in common is good of his moiety tho' undivided. *Br. Abr.* Feoffment *pl.* 75.

A feoffment may be made of an upper chamber over another man's houſe beneath. Co. ſuper Lit. 48.

If there be a meadow of one hundred acres, which time out of mind hath been divided amongſt divers perſons, and each perſon hath a certain number of acres, but in no certain place, the cuſtom being to allot each perſon his number one year in one place, and another in another *alternis vicibus*; in this caſe, either of theſe perſons may make a feoffment of his part, by the name of ſo many acres lying in ſuch a meadow, without any bounding or deſcribing of it. Co. ſuper Lit. 4. 48.

If parceners have made partition of their land, that the one ſhall have it from Eaſter to Lammas to her and her heirs, and the other ſhall have it from Lammas to Eaſter to her and her heirs, or that the one ſhall have it one year, and the other the other year *alternis vicibus*: or if they have two manors deſcended, and they agree that the one ſhall have the one manor one year, and the other the other manor the ſame year, and the next year that he that had the one ſhall have the other *alternis vicibus* for ever; in theſe caſes the parceners may either of them make a feoffment of this land or manor (1). Co. ſuper Lit. 4. 48.

3. In reſpect of the preſence or poſſeſſion of other perſons on the land at the time of the feoffment made.

If there be any leaſe for life or years in being of that land or thing whereof the feoffment is made, and he that hath this leaſe for life or years, or in his abſence his bailiff or ſervant keeping in the houſe or land whereof the feoffment is to be made, doth give leave and agree that livery of ſeiſin ſhall be given upon the houſe or land by the leſſor himſelf or by his attorney, and for this cauſe doth leave the poſſeſſion of the houſe or land, and thereupon livery of ſeiſin is made; this is a good feoffment and a good livery of ſeiſin and yet it doth not prejudice the eſtate of the leſſee. And if the leſſor make a feoffment of the land to a ſtranger by aſſent or licence of the leſſee the leſſee then being on the land; this is a good feoffment. In like manner as it is, where the leſſor doth enfeoff a ſtranger to which the termor doth agree ſaving his term. And if the leſſor make ſuch an entry upon the leſſee for life, or years, as to put him out of poſſeſſion of the houſe or land, and then he doth make a feoffment and livery of ſeiſin of it; or if the leſſor in the abſence of the leſſee, his wife, ſervants and children enter upon the thing in leaſe and make * a feoffment and livery of ſeiſin thereof; in theſe caſes there is as good feoffment to paſs the reverſion, for in theſe caſes, when the leſſee for life or years doth re-enter, the law doth adjudge this to be an atturnment in law. But if a leſſor will enter upon his leſſee, and againſt his will (the leſſee being ſtill in poſſeſſion of the land) make a feoffment of the land, and give livery; this is void, and can never take effect as a feoffment. And therefore if there be a conveyance made of a houſe and land thereunto belonging in leaſe, and the feoffor comes into part of the land without the leave of the leſſee, and there make livery of ſeiſin of that part in the name of all the reſt of the land, (the leſſee himſelf, his wife, child, or ſervant being then upon any other part of the land, and eſpecially if they be in the houſe) this is no good feoffment for any part of the land, but void for the whole. And yet if the leſſee for Co. 2. 32. Dier 340. 18. Perk. Sect. 221. 21 H. 7. 7. Perk. Sect. 220. 46 E. 3. 25. Bro. Feoffments de terre 68. Co. ſuper Lit. 48. 49. 52.

* P. 207.

Atturnment.

(1) See further of what things a feoffment may be made, *Com. Dig.* Feoffment (A. 2.) *Vin. Abr.* Feoffment (C).

years

Veynor's case Trin. Jac. B. R.

years make an under-leaſe of part of the land to another, and the feoffor doth make a feoffment of this part, and give livery of ſeiſin upon this part; in this caſe the poſſeſſion of the firſt leſſee in the reſidue will not hurt the feoffment, or livery for this part, but it is a good feoffment. Alſo if the leſſee give the leſſor leave to make livery, and depart and leave a ſervant of the leſſee upon the land; in this caſe it ſeems his preſence upon the land whilſt the livery is made will not hurt. And ſo if the leſſee leave the poſſeſſion and leave nothing upon the land but his cattle; they will not keep his poſſeſſion, nor prejudice the livery of ſeiſin (1).

Co. ſuper Lit. 48.

21 H. 7. 7. Dier 18.

If a leaſe be made of one acre to one, and another acre to another, and the leſſor make a feoffment of both theſe acres, and make livery in one of them in the name of both acres; this is no good feoffment for the other acre, for by this livery he is not put out of poſſeſſion of that acre. So if one make a a feoffment of two manors, the one in poſſeſſion and the other in leaſe, and give livery of ſeiſin of the manor in poſſeſſion in the name of both the manors; this is no good feoffment for the other manor, neither will it paſs by this feoffment. So if one make a leaſe for years of a houſe, and after make a feoffment in fee of the houſe and of a cloſe adjoining, and give livery of ſeiſin of the houſe, the termor's wife and children being then in the houſe, in this caſe this is no good livery neither to paſs the houſe nor the cloſe.

Perk. Sect. 222. Dier 362.

Forfeiture.

If leſſee for life, or years, make a feoffment of the land, the leſſor being then upon the land and not contradicting it; it ſeems this is a good feoffment, and that the preſence of the leſſor upon the land, eſpecially if he do not contradict it, will not hinder the virtue of the feoffment as againſt the feoffor and all others; but the leſſor may enter afterwards for the forfeiture notwithſtanding if he pleaſe.

Perk Sect. 223.

Huſband and wife.

If the huſband alone make a feoffment of the land, he hath in the * right of his wife, or that he hath jointly with his wife, his wife being then upon the land and diſagreeing to it; in this caſe the feoffment is good againſt the feoffor, and all others, but the wife, who notwithſtanding her preſence and diſagreement, may after his death avoid it.

* P. 208.

Perk. Sect. 220.

Jointenant.

If one jointenant make a feoffment of the whole land, his companion being then upon the land; by this there doth paſs no more but a moiety, and the feoffment is void as to the moiety of his companion, for the feoffment doth not give his moiety (2).

Perk. Sect. 219.

If a man enter into my land by wrong, and make a feoffment of it to a ſtranger, I being then upon the land; this feoffment is void, for in this caſe the law doth adjudge me to be always in, and never out of the poſſeſſion.

Perk. Sect. 219. Bro. Feoffment. 3. 17. 21 H. 7. 7. 2 H. 6. 5. 1 H. 7. 5. Stamf. prer. Regis 40.

Prerogative.

If the King have any poſſeſſion of the land by wardſhip or otherwiſe, the owner of the land can make no feoffment of it. And therefore if the King be entitled to land by wardſhip, or primer ſeiſin, after office found after the death of an anceſtor of one of his tenants; in this caſe it is ſaid the feoffment of

(1) Lord *Cokes* words are "if the leſſee be abſent, and hath neither wife nor ſervants (though he hath cattle) upon the grounds" the livery of ſeiſin ſhall be good. *Co. Lit.* 48. b. but if leſſee conſents, tho' he be upon the ground, livery is good. *Fr.* 40th. *Eliz. Shephard* and *Gray*. See further in *note* 8. to 13th. edition. *Co. Lit.* 48. b.

(2) Ante p. 201. note 2.

the heir is void and paſſeth nothing, for the King is ſtill in poſſeſſion. And if it be before office found it will be all one, for the office ſhall relate to the death of the anceſtor. And yet in theſe caſes the feoffment is good againſt the heir himſelf, and all others beſides the King. If the heir, before office found, enter and make a feoffment, and then the King doth pardon the feoffee; in this caſe the feoffment is good. And yet ſuch a feoffment after office with a pardon is void. And the like law is if the entry be before office, and the pardon after the office; for this is void alſo. But if a man be outlawed for debt or treſpaſs, and thereupon the King hath the profits of the lands; in this caſe the owner may make a feoffment of this land notwithſtanding.

Outlawed perſons.

4. In reſpect of the manner of making of it.

Reverſion.

Divers perſons cannot make a feoffment but it muſt be by deed, as corporations, and ſuch like: alſo divers things cannot be granted by a feoffment, but the feoffment muſt be by deed, for a feoffment cannot be made of a reverſion of land but it muſt be by deed. But a leaſe may be made of land to one for life, the remainder to another in fee, and this may be done without any writing by word only (1). Alſo a feoffment may be made of the moiety, third, or fourth part of a manor, or of a piece of land without deed. And yet if one be ſeiſed of a manor, whereunto an advowſon is appendant, and he make a feoffment of three acres parcel of the manor, together with the advowſon to two men, *Habendum* the one moiety with the advowſon to one of them, and the other moiety to the other; in this caſe the feoffment cannot be well made unleſs it be by deed.

Fitz. Faits. & Feoffments 32. See Grant Numb. 4.

Lit. Sect. 60. ſuper Lit. 190.

If a leaſe be made for five years, on condition that if the leſſee pay to the leſſor within the two firſt years ten pounds, then that he ſhall * have the land to him and his heirs, or otherwiſe but for five years; in this caſe if livery of ſeiſin be made to the leſſee before his entry this is a good feoffment. *Et ſic de ſimilibus.*

Lit. Sect. 250.

* P. 209.

Livery of ſeiſin.

Every feoffment alſo whether it be made by deed or without deed muſt be made with livery of ſeiſin, and this livery of ſeiſin muſt be made according to the rules of livery and ſeiſin herein after laid down, for this is of the eſſence of a feoffment, and a feoffment is not accounted perfect until livery of ſeiſin be made, for until then, the feoffee hath only an eſtate at will in the land, and the feoffor may put him out when he will. And if either of the parties die before the livery of ſeiſin be made the feoffment is void, and no warrant of attorney to make livery can be executed after the death of the feoffor or feoffee, neither is there any remedy in this caſe to get the aſſurance to be made perfect but in a Court of Equi-

Lit. Sect. 59. 66. Co. ſuper Lit. 52. Doct. & Stud. 13.

Equity.

(1) But by the ſtatute of 29 *Car.* 2. *c.* 3. § 3. It is enacted "That no leaſes, eſtates or intereſts, either "of freehold, or terms of years, or any uncertain intereſt, not being copyhold or cuſtomary intereſt, of, in, "to or out of any meſſuages, manors, lands, tenements, or hereditaments, ſhall be aſſigned, granted or ſur-"rendered, unleſs it be by deed or note in writing ſigned by the party ſo aſſigning, granting or ſurrendering the "ſame, or their agents thereunto lawfully authoriſed by writing, or by act and operation of law".—and by the ſame ſtatute It is enacted "That all leaſes eſtates, intereſts of freehold, or terms of years, or any "uncertain intereſt of, in, to or out of any meſſuages, manors, &c. made or created by livery and ſeiſin only, "or by parol, and not put in writing, and ſigned by the parties ſo making or creating the ſame, or their "agents thereunto lawfully authorized by writing, ſhall have the force and effect of leaſes or eſtates at will "only, and ſhall not either in law or equity be deemed or taken to have any other or greater force or "effect; any conſideration for making any ſuch parol leaſes or eſtates, or any former law or uſage to the "contrary notwithſtanding".

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ty (1). But in case where there are many feoffees, there the death of one or some of them will not hinder the livery, but it may be made to him or them that do survive: we must see therefore in the next place what this livery of seisin is.

New termes of the law.

5. Livery of seisin, *Quid.*

Livery of seisin, or giving of possession, is a solemnity or overt ceremony, required by law, and used for the passing of lands or tenements corporeal, as an evidence or testimonial of the willing departing by him that makes the livery, from the thing whereof livery is made, and the willing acceptance thereof by the other party (2). And this is as ancient as a feoffment; for no feoffment is made without livery of seisin, albeit livery of seisin be sometimes made upon other conveyances. And it was first invented as an open and notorious act to this end; and that by this means the country might take notice howlands do pass from man to man, and who is owner thereof; that such as have title thereunto may know against whom to bring their actions; and that others may know that have cause, of whom to take leases, and of whom to require wardships, *&c.* And by this means, if the title come in question, the jury can the better tell in whom the right is (3). And of this livery of seisin there are two kinds. 1. A livery in deed. 2. A livery in law, called a livery within view. The livery in deed, is, when the feoffor, donor, *&c.* by himself, or another, taketh the ring of the door of the house, or a turf, or twig of the land, and delivereth the same upon the land unto the feoffee, donee, *&c.* in the name of seisin of the house, or seisin of the land. And this is done sometimes by the parties themselves if they be present, and sometimes in their absence by their attornies or procurators. The livery in law, is, where the feoffor saith to the feoffee, being in view of the land, I give you yonder house to you and your heirs, go enter into the same, and take possession thereof accordingly, or the like (4).

West 2. part Symb. Sect. 251. Co. super Lit. 48.

Co. super Lit. 48.

6. *Quotuplex.*

Because this manner of conveyance by feoffment is so ancient, therefore this ceremony (being inseparably incident to a feoffment) is much favoured in law: and therefore it is expounded and taken strongly against him that doth make it, and beneficially for him to whom it is made. And for this cause, it worketh not only to transmit the present estate, but also to bar

Bro. estates 4. Plow. 28. 29.

7. The nature and operation of it.

* P. 210.

(1) In the case of *Jackson* v. *Jackson* heard in *November* 1730, a deed of lands in two different counties, by way of feoffment; livery and seisin of the lands in one county only, indorsed.—The deed was made in 1657. Ld. Chancellor *King* declared the plaintiff had a good foundation to apply to a court of equity, as he had not his evidences to try his title at law.—that were he to try the matter (at law) he should presume, and so direct, that livery was executed according to the deed, after that length of time; but that however a court of equity would aid a defect of that kind. *Fitz. Gibb. Rep.* 146. S. C. in select *Cases in Chancery* 81.—See also *Bokenham* v. *Bokenham*, 1 *Chan. Ca.* 240.—and where such a defective conveyance is aided, it shall be discharged of mesne incumbrances by the party; as, if a mortgage wants livery; and thereupon the heir confesses judgments to another, the mortgagee shall be released and discharged from the judgments. *Burgh* v. *Burgh*, *Rep. in Chan. Temp. Finch* 28.—The assistance and relief, afforded by a court of equity, in aid of a defective conveyance, is very extensive; it will remedy not only mistakes in form or upon the face of the deed, but will supply the material part or essence of a conveyance; as livery to a feoffment, a surrender of a copyhold; *&c.*—In what cases, and in what manner, equity will supply defective conveyances, see in *Com. Dig.* Chancery (2 T.) Copyhold (P. 2.) *Eq. Ca. Abr.* Deeds (D.) *Vin. Abr.* Faits (T. a.)

(2) *Seisin* is a technical term, to denote the completion of that investiture, by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass, *per* Ld. *Mansfield*, 1 *Burr.* 107. —For the original intent and manner of transferring lands by livery of seisin, see *Spel. Gloss.* 510. *Mad. Form Angl.* Dissert 9.

(3) The disuse of livery of seisin, and the want of sufficient notority thereby occasioned, is very frequently regretted by Mr. J. *Blackstone*. See 2 vol. *Com.* 337. See also *Bac.* Law Tracts. 154.

(4) In what cases livery may be made within the view, see *Vin. Abr.* Feoffment (M.) and further as to the different kinds of livery, in *Bac. Abr.* Feoffment (A.) *Com. Dig.* Feoffment (B.)

all preſent and future rights and poſſibilities. If therefore one make a leaſe for life to *I. S.* the remainder to the right heirs of *I. D.* (which *I. D.* is then living) and give livery of ſeiſin according to the deed; in this caſe, albeit he in remainder be not capable of this remainder, yet by the livery it ſhall paſs out of the feoffor, and ſhall be in abeyance during the life of *I. S.* So if a feoffment be made to one *& heredibus*, without the word [*Suis*,] and livery of ſeiſin be made of the deed; this livery perhaps may make the eſtate good (1).

8. Where and in what caſes it is requiſite: or not.

Livery of ſeiſin is needful, and muſt be had and made, in all caſes where any eſtate of fee ſimple, fee tail, or for a man's own or another man's life, is made or granted by writing, or word, in the country of any lands or tenements corporeal (2). And ſo alſo where one doth make a leaſe of land to another for years, the remainder to a ſtranger in fee ſimple, fee tail, or for life; in theſe caſes, livery of ſeiſin muſt be had and made to the leſſee for years, or elſe nothing will paſs to him in remainder; and yet the leaſe for years will be good. And ſo alſo where a leaſe for years is made, upon condition that if ſuch a thing happen the leſſee ſhall have the fee ſimple; in this caſe, the leſſee muſt have livery of ſeiſin before his entry, otherwiſe the eſtate will not increaſe. And ſo alſo if the King make a feoffment of the land he hath in the right of the Duchy of Lancaſter that is not within the county Palatine; in this caſe, livery of ſeiſin muſt be made as in the caſe of a ſubject. And in all theſe caſes where livery of ſeiſin is requiſite, and it is not made, there doth paſs no eſtate by the conveyance but an eſtate at will at the moſt.

Co. 5. 92. Lit. Sect. 70. Co. 6. 26. Doct. & Stud. 23. Co. ſuper Lit. 49. Co. ſuper Lit. 216. Plow. 214. 219.

But livery of ſeiſin is not needful or requiſite to be had and made, in caſes where any eſtate or fee ſimple, fee tail, or for life, is made, or granted, of any lands, by matter of record, as, by the King's letters patents, fine, recovery, deed indented and inrolled, and the like: nor is it needful where any ſuch eſtate is created by way of covenant and raiſing of uſe, by way of exchange, indowment *ad oſtium eccleſiæ*, or *ex aſſenſu patris*; nor is it needful where any ſuch eſtate is paſſed or granted by way of ſurrender, deviſe, releaſe, or confirmation, or by way of increaſe or executory grant; as when the fee ſimple is granted to the leſſee for life or years in poſſeſſion: neither is it requiſite, or can be made, where any incorporeal hereditaments, as reverſions, rents, commons, or the like, are granted in fee ſimple, fee tail, or for life: for in ſome of theſe caſes there is an attornment to be made that doth * ſupply a livery: neither is it requiſite in ſome caſes where an eſtate of freehold is made of a corporeal thing; as if a houſe or land belong to an office, and the office be granted by deed; in this caſe, the houſe or land doth paſs as incident thereunto. So if a houſe or chamber belong to a corody; in this caſe, by the grant of the corody, the houſe or chamber paſſeth without any livery of ſeiſin. Neither is it requiſite upon a leaſe for years; for if a man make a leaſe for one thouſand years, this leaſe is perfect

Co. 2. 23. Lit. Sect. 59. Co. ſuper Lit. 49.

* P. 211.

(1) As to the operation of livery to paſs a future intereſt, where the feoffor is out of poſſeſſion; and in what caſes ſeveral parcels will paſs by one livery, or where ſeveral parties may take by a livery to one, ſee *Bac. Abr.* Feoffment (B.)

(2) For at common law no eſtate of freehold in lands could paſs without livery of ſeiſin: and therefore it is a rule that no freehold can be created to commence in *future*; for the livery of ſeiſin muſt operate immediately, or not at all. 5 *Co.* 94.

by

Co. 8. 127. 11. 49. by the delivery of the deed without any livery of ſeiſin. Neither is it needful where one doth grant to me and my heirs all the trees growing on his ground; for theſe will paſs without any livery of ſeiſin at all (1).

Perk. Sect. 184. Co. ſuper Lit. 48. 49. 52. Livery of ſeiſin may and muſt be made either by the party himſelf that maketh the eſtate, or if it be a livery in deed, it may in his abſence be made by his attorney ſufficiently authorized by writing. And he that may make an eſtate, to the perfection whereof livery is requiſite, may himſelf, and in his own right, make livery thereupon; and in the right of another, and as attorney to another; ſo divers that cannot make any eſtate, may notwithſtanding make livery of ſeiſin. And therefore the huſband albeit he may not make a feoffment in fee, or leaſe for life, *&c.* of land to his wife, yet he may as an attorney make livery of ſeiſin to her upon a conveyance made by another. And ſo alſo may the wife upon a conveyance made to the huſband or her. And ſo alſo monks, infants, aliens, and ſuch like perſons diſabled to make feoffments *&c.* may notwithſtanding make livery of ſeiſin as attorney's upon conveyances made by others. And ſo likewiſe may he

Co. ſuper Lit. 48. 49. in remainder in fee make livery to the leſſee for years. *Et ſic de ſimilibus.* And this livery of ſeiſin may and muſt be made to the party himſelf that taketh the eſtate, or in his abſence to his attorney or procurator ſufficiently authorized: and in this caſe any one may be an attorney to take that may be an attor-

Dier 35. Co. ſuper Lit. 49. 359. Co. 5. 95. ney to give livery. If a feoffment be made to divers by deed, and livery of ſeiſin is made to one or ſome of them; this is a good livery to execute the eſtate to them all. But if a feoffment be made to divers without deed, and livery of ſeiſin is made to one or ſome of them in the name of all the reſt; in this caſe, the feoffment is good to execute the eſtate in him or them to whom the livery is made, and void as to the reſt.

Co. ſuper Lit. 217. If a leaſe for years be made to *A.* and *B.* without deed, the remainder to *D.* in fee, and livery of ſeiſin is made to *A.* or *B.* in this caſe this is a good livery to make the remainder to paſs to *D.* But if a leaſe be made for years to *A.* the remainder to the right heirs of *I. S.* in fee *I. S.* being then living, and livery of ſeiſin is given to *A.* this remainder is void, for *nemo eſt heres viventis.* One jointenant cannot make livery of ſeiſin to his companion as a tenant in common may. And a leſſor

Perk. 40. 10 E. 4. 3. cannot * make livery of ſeiſin to his leſſee for life or years. See before *numb.* 4. * P. 212.

Co. ſuper Lit. 52. In all caſes where this ceremony is requiſite, whether it be done by the parties themſelves in perſon, or their deputies, it muſt be done and made, 1. in the life time of the feoffor, donor, or leſſor, and in the life time of the feoffee, donee, or leſſee; for if either of them die, it cannot be done afterwards; neither can a warrant of attorney be made to deliver ſeiſin after the death of the feoffor, *&c.* But if there be more feoffees, donees, or leſſees, than one; in ſuch caſes, albeit all of them die but one, the livery of ſeiſin may be made to that one that doth ſurvive, and it will be good to him to execute the eſtate in all the land. And ſo it is if there be a warrant of attorney made by a corporation aggregate, as a Mayor and Communalty,

9. How it may be and muſt be made: and what ſhall be ſaid a good livery of ſeiſin: or not.
1. In reſpect of the perſons that make it, and to whom it is made, and the quality of their eſtate.
Woman covert
Infant.

2. In reſpect of the time when it is made.

(1) See more amply in what caſes livery of ſeiſin is requiſite in *Vin. Abr.* Feoffment (B.)

Dean and Chapter, or the like, to give livery of seisin, in this case the death of the Mayor, *&c.* will not determine the authority; and therefore in that case the livery of seisin may be made after his death. 2. If it be a lease for years with a remainder over in fee, the livery must be made to the lessee for years before his entry or at the time when he doth enter for that purpose; for afterwards it cannot be made. *Quod semel meum est, amplius meum esse non potest.* *Quere* also whether the law be not so in all other cases; and let men take heed they do not (as commonly they do) enter into the land before they have livery of seisin made thereof unto them. And yet it seems the livery of seisin is good, when it is made afterwards, by *Co.* 2. 55. 3. It must not be made before the estate begin; for if a lease be made for years to begin at Michaelmas with a remainder over, and the livery of seisin is made before Michaelmas; this livery of seisin is void; for if a livery work at all, it must work presently; and so it cannot in this case, because it is before the estate doth begin.

Co. super Lit. 49. 216. Perk. Sect. 205.

A caveat.

Co. super Lit. 217.

3. In respect of the place or thing wherein it is made.

If an estate be made of divers pieces of land in divers villages in the same county; in this case, the making of livery of seisin of and in any part thereof, in the name of all the rest, or of one parcel according to the deed, albeit he doth not say in the name of, *&c.* sufficeth for all, if all the pieces be in the grantors possession and out of lease. But if the pieces of land lie in divers counties; or in the same county, and they be in lease, or out of the possession of the feoffor, *contra*; for in that case the making of livery in one part in the name of all the rest, is not sufficient for the rest; for in this case, it is requisite that livery of seisin be made upon and in some of the lands in both counties, and upon every parcel of land that is out of possession, or at least in some parcel of the land in the occupation of every several tenant. And yet if one part of a manor be in one county, and the other part in another county in view of that part; in this case it seems livery of seisin in the one part in the one county, in view of the other part in the other county, is good and sufficeth for all * So if the scite of a manor lie in one county, and the rest of the manor in another county; in this case, the making of livery in the scite of the manor is sufficient for the whole manor. If a feoffment be made of the manor of *Dale* in *Sale*, the which manor doth extend in *Dale* and *Sale*, and livery of seisin is made accordingly in *Dale* only and not in *Sale* also; by this feoffment there doth pass no more of the manor but that which is in *Dale* only (1). If I be seised of one acre in fee, and of another acre for life, and I make a feoffment of both acres, and make livery of seisin in that acre whereof I am seised in fee in the name of both acres; in this case it seems this sufficeth to pass both the acres. But if I be seised of one acre in fee, and possessed of another acre for years, and I make a feoffment of both acres and livery of seisin in that acre only whereof I am seised in

Co. super Lit. 48. Perk. Sect. 227. 228. Doct. & Stud. 3. Lit. Sect. 61. 418. Perk. Sect. 226. Fitz. feoffments & Faits. 122.

* P. 213.

Perk Sect. 228.

9 H. 7. 25. per Frowick.

(1) If a manor extends into two counties, livery in that part of the manor which is in one county, doth not pass that which is in the other county. So it is with respect to disseisin. *Hal. MSS.* But Mr. *Perkins* holds, *that livery of parcel of such a manor in one county will pass the parcel in the other county.* *Perk. Sect.* 229. However he admits that if one be disseised of two acres in different counties, entry into one acre in one of the counties though made in the name of both acres, will not extend to the acre in the other county. *Perk. Sect.* 229. *note* 2, to *Co. Lit.* 50. a. 13th edition. See further in *Vin. Abr.* Feoffment (D. a.) pl. 4.

Fits. Faits & Feoffments. 20.

fee, in the name of both the acres, *contra*; for this is as if I make a feoffment of land whereof I am ſeiſed, and of other land whereof I am not ſeiſed, *&c.* If I be ſeiſed of two acres of land, and let one of them for years, and then make an eſtate of both of them to another, and make livery of ſeiſin in that I have in poſſeſſion, in the name of both the acres; this will not ſerve to paſs the other acre, but livery muſt be made in that acre alſo. And accordingly it was agreed in a caſe in

Montague verſus Jefferies

the King's Bench *Hil.* 38 *Eliz.* which was, that a man was ſeiſed in fee of a manor and other lands called groves, and he made a feoffment of it (groves being then in leaſe for years) and a letter of attorney to give livery, and the attorney made livery of the manor in the name of the reſt, the leſſee being ſtill in poſſeſſion of groves; in this caſe it was agreed that this was no good feoffment for groves.

See infra.

When a feoffment is made of a houſe and land, the livery of ſeiſin is moſt aptly to be made of and in the houſe in the name of the reſt, and at the door of the houſe, *&c.* And when a feoffment is made of a rectory or parſonage; the livery of ſeiſin may be made in the parſonage houſe; or, if there be no houſe, it may be made upon the glebe; or, if there be neither, it may be made at the ring of the church door.

See before Numb. 4.

In the making of every livery of ſeiſin it is requiſite that all perſons that have any lawful eſtate and poſſeſſion in the thing whereof livery is to be made, as leſſees for life, years, and ſuch like, join in the making thereof, or be removed thence; for every livery ought to bring an immediate poſſeſſion to the feoffee, donee, *&c.*

4. In reſpect of the preſence or poſſeſſion of others.

Dier 362.

If leſſee for years make a feoffment and a warrant of attorney to give livery of ſeiſin, and the attorney make livery of ſeiſin, the leſſor being preſent upon the land, and not contradicting it; it ſeems this is a good livery of ſeiſin.

Bro. feoffments 24.

The preſence of the feoffor, donor, *&c.* upon the land after he hath delivered ſeiſin to the feoffee, donee, *&c.* albeit he ſtay upon the * land a while, and do not depart and leave the feoffee, *&c.* in poſſeſſion, will not hurt the livery. See more *ſupra numb.* 4.

* P. 214.

Co. ſuper Lit. 49.

Livery of ſeiſin may be made of any corporeal thing, as manors, houſes, lands, meadows, paſtures, woods, chambers, or the like. And theſe things therefore are ſaid to lie in livery. But of incorporeal things, as rents, advowſons, commons, eſtovers, and ſuch like things livery cannot be made. And theſe things therefore are ſaid to lie in grant and not in livery. And therefore when a livery is made of theſe *nil operatur*. See more above *numb.* 4. (1).

5. In reſpect of the matter whereof it is to be made.

Co. 9. 137. ſuper Lit. 49.

To every good livery of ſeiſin is requiſite either ſuch an act as the law doth adjudge to be a livery, or apt words that do amount unto it, for a livery may be good by words without any act or deed at all; but it cannot be good by an act or deed without any words at all; howbeit that livery that hath an act or ceremony in it is the beſt, becauſe it taketh the deepeſt impreſſion in the witneſſes.

6. In reſpect of the manner and order of making it: and how livery of ſeiſin is to be made.

Weſt. Symb. 1. part. Sect. 251. Perk. Sect. 209. 210 Co. ſuper Lit. 48.

The moſt uſual formal and orderly manner of making of livery of ſeiſin is thus; that the feoffor, donor, *&c.* and the

(1) And further in *Vin. Abr.* Feoffment (C.) *Com. Dig.* Feoffment. (A. 2.)

feoffee, donee, *&c.* if they be preſent; or, in their abſence their attornies or ſervants that have authority; do come to the door, backſide, or garden if it be a houſe, if not, then to ſome part of the land where ſeiſin is to be delivered, and there in the preſence of many good witneſſes do ſhew the cauſe of their meeting, and openly and plainly do read the deed, or declare the contents thereof, and of the letter of attorney if there be any. And then the feoffor, *&c.* or his attorney (if it be a houſe) do take the ring, latch, or haſp of the door (all the people, men, women and children being out of the houſe,) or (if if be of a piece of ground) do take a clod of the ground, or a bough or twig of a tree, or buſh, growing thereupon; and (all the people being out of the ground) the ſame ring, *&c.* clod, bough, *&c.* with the deed do deliver to the feoffee, donee, *&c.* or to his attorney; and in the delivery thereof do uſe theſe or ſome ſuch like words, *viz.* I deliver theſe to you in the name of ſeiſin of all the lands and tenements contained in this deed, to have and to hold according to the form and effect of the ſame deed. Or, I deliver you ſeiſin and poſſeſſion of this houſe, or ground, in the name of all the lands contained in the deed, according to the form and effect of the deed (1). And then if it be a houſe, the feoffee, *&c.* doth enter in firſt alone, and ſhut the door, and then he doth open it, and let in others. And if the feoffment, gift, or leaſe be made without deed, then they do and muſt withal expreſs the very eſtate itſelf which the feoffee, donee, or leſſee is to have: as for example, the feoffor, donor, or leſſor muſt come to the houſe, or land, which is to be granted, and where livery of ſeiſin is to be made, and there muſt by apt words grant the houſe or land to him that is to have it, in fee ſimple, or in tail, or for life, (as the agreement is) and in ſeiſin thereof muſt * deliver him the ring of the door, or a turf or twig of the land. And if the feoffment, *&c.* be made by writing, then it is wiſdom to indorſe and ſet down on the back of the ſame, how, when, and where the ſame is made, and the names of the witneſſes thereunto. But a livery of ſeiſin that is not ſo exactly made may be good notwithſtanding. And therefore if the feoffor, donor, *&c.* or his attorney, take any thing elſe that comes from off the land, as a ſtone, or the like, and therewithal doth make the livery of ſeiſin; or if he take a turf, or twig from off another man's ground, and not from the ſame whereof poſſeſſion is to be given, and deliver that upon the ground in the name of ſeiſin; or if he take a piece of ſilver or gold, or a rod, ſtick, or the like, and deliver this upon the land in the name of ſeiſin; all theſe are good deliveries of ſeiſin and poſſeſſion. So if the feoffor, *&c.* be at the door of the houſe, or by the land, or in the houſe, or upon the land, and after he hath delivered the deed he ſay to the feoffee, donee, *&c.* [Here I deliver you ſeiſin and poſſeſſion of this houſe, or land, in the name of ſeiſin and poſſeſſion of all the lands and tenements contained in the deed;] Or, [have and enjoy this houſe or land according to the deed;] Or, [enter into this land or houſe and God give you joy of it;] Or, [I am content you ſhall enjoy this

* P. 215.

Co. 9. 137. Fitz. Feoffments & faits. 111.

Co. 6. 26. 41 E. 3. 17.

(1) In the times of our Saxon anceſtors the delivery of a turf was a neceſſary ſolemnity to eſtabliſh a conveyance of lands. *Hicke's* Diſſert. Epiſtolar. 85. 2 *Bl. Com.* 313.

land;] in all theſe caſes there is a good livery of ſeiſin. *Et ſic de ſimilibus.*

Bro Feoffment 28. If I being ſeiſed of a houſe in fee, make a feoffment of it and of divers lands, to a man then preſent with me in the ſame houſe, and there deliver him the deed in the name of ſeiſin of all the lands contained in the deed; in this caſe, this is a good delivery of the deed, and a good livery of ſeiſin alſo, albeit I continue in poſſeſſion of the houſe ſtill and go not out of it. And if I be Lord of a manor, and lying ſick within ſome part of the manor, I make a feoffment of the manor, and deliver the deed to the feoffee, ſaying to him, I will that you take ſeiſin preſently; and thereupon command all my tenants of the manor to attorn to him, and they do ſo; this is a good livery of ſeiſin. So if I make a deed, and after I have read it, being upon the land, I deliver it to the feoffee, donee, *&c.* and ſay, here I deliver you this charter as my deed in the name of ſeiſin of all the lands therein contained, or the like; this is a good delivery of the deed and of ſeiſin. But if I do only ſeal and deliver the deed upon or in view of the land, without ſaying or doing any more; this will not amount to a livery of ſeiſin. And therefore if a man make a feoffment with a letter of attorney to give livery of ſeiſin, and then he deliver the deed upon the land; this is no good making of livery of ſeiſin. And ſo alſo if there be no letter of attorney.

Perk. Sect. 211, 112.

Perk. Sect. 215. Co. 6. 26.

Cromwal's caſe. Adjudged in the Exchequer 15 El.

Co. 6. 26. If I be ſeiſed of a houſe in fee, and being in the houſe ſay to *I. S.* here *I. S.* I demiſe you this houſe for term of my life; this * will not amount to a livery of ſeiſin; and therefore it is no good leaſe until livery of ſeiſin be made, but it is a good beginning of a leaſe. * P. 216.

Perk. Sect. 216. If the father infeoff his ſon of land, and the ſon ſuffer his father to enjoy it, and after the ſon doth come to the pariſh church where the land doth lie, and there, in the audience of the pariſhioners, uſeth theſe words to his father, [father you have given me ſuch and ſuch lands (and doth name them) as freely as you gave them to me I give them to you again;] this is no good livery of ſeiſin, neither doth any eſtate paſs hereby.

Hil. 37 El. B. R. Callard's caſe. So if one being upon his land ſay to *I. S.* [*I. S.* ſtand forth, I do here, reſerving an eſtate to me for mine own life, give this land to thee and thy heirs for ever;] this is no good livery of ſeiſin, neither doth any eſtate paſs thereby.

Fitz. faits & feoffments So if one make a charter of feoffment to me, and make no livery of ſeiſin thereupon, and after I make a feoffment of the land to *I. S.* and the feoffor hearing and having notice of it, ſaith, [I do willingly agree to it, and am contented that *I. S.* ſhall have it;] or I do agree to the feoffment, or the like; in this caſe this doth not make the feoffment that was made to me good.

Co. ſuper Lit. 48. Fitz. Eſtop pel. 177. If divers parcels of land be conveyed, and livery of ſeiſin is made in one; or there be divers feoffees, and livery of ſeiſin is made to one of them according to the deed, without uſing any more words; this is good. But the beſt form and order of making of livery in this caſe is to add theſe words, [in the name of all the reſt, *&c.*] (1).

(1) See more amply as to livery of ſeiſin in deed, by whom, at what time, and in what manner it may be made, in *Bac. Abr.* Feoffment (A.) *Vin. Abr.* Feoffment (E.) (F.) *Com. Dig.* Feoffment (B.)

If

Livery in law, or within the view.

If the feoffor, donor, *&c.* deliver the deed in ſight or view of the land, and uſe theſe or any ſuch like words, [I will that you ſhall enter into the land and have it according to the deed;] or, [take and enjoy the land according to the deed;] or, [I deliver you this deed in the name of ſeiſin;] or, [enter you into the land and take ſeiſin of it;] or, [take the land and God give you joy of it;] or, (if the eſtate be made without deed) [I give you yonder land to you and your heirs, and go and enter into the ſame, and take poſſeſſion thereof accordingly;] or, [enter into the land and enjoy it in fee ſimple to you and your heirs, or for your life, *&c.*] in all theſe caſes the eſtate and the livery is good, albeit the feoffor, *&c.* ſtand in one county, and the land in view be in another county. But in all theſe caſes of livery within the view. 1. It muſt be made by the perſon himſelf that doth make the eſtate, for it cannot be made by his attorney. 2. There muſt be a relation to the land, for if the feoffor do deliver the deed only to the feoffee in ſight of the land; this is not a good livery within the view. 3. The parties muſt ſtand within view of the land, for if the feoffor, *&c.* being out of the ſight of the land ſay to the feoffee, *&c.* Go and enter, and take ſeiſin of the land, and God ſend you joy of it; this is no good livery of ſeiſin. 4. There muſt be ſome * body capable of a freehold to take by the livery, for if it be made to a leſſee for years, the remainder to the right heirs of *I. S.* and *I. S.* is then living, it is void. 5. The feoffee, *&c.* muſt enter preſently, for if either the feoffor, donor, *&c.* or feoffee, donee, *&c.* die before entry; the livery cannot be made good (1). And yet if the party dare not enter for fear, in this caſe if he claim it only, and do not enter it is ſufficient (2).

Co. 9. 137. 6. 26. ſuper Lit. 48. 233.

1] New terms of the law. Co. ſuper Lit. 48. Dier 18. 2] 18 H. 6. 16. 3] Co. ſuper Lit. 47.

* P. 217.

5] Co. 1. 156. Perk. Sect. 214. Fitz. faits & feoffments. 49.

10. Where livery of ſeiſin made or taken by an attorney ſhall be good: and where not: and what warrant is ſufficient.

Livery of ſeiſin in deed may be made or taken by the deputies or attornies of the parties, and this livery by them is as good as that livery of ſeiſin which is made by the parties themſelves; and that alſo as it ſeems albeit the parties themſelves be upon the land at the time of the making thereof if they do not contradict it (3). But in the making of this livery care muſt be had. 1. That there be a deed of feoffment, for otherwiſe a letter of attorney to deliver poſſeſſion availeth nothing. 2. That there be a good authority in writing, which may be either in the deed of feoffment itſelf, whether it be poll, or indented, and that albeit the attorney be not party to it, or elſe by a ſingle deed beſides the feoffment, *&c.* 3. That the attorney do purſue his authority at leaſt in the ſubſtance and effect of it. 4. That the attorney do it in the name of the feoffor,

Co. ſuper Lit. 52. Celw. 51. Co 9. 76. Terms of the law tit. Livery.

The opinion therefore in Co ſuper Lit 52. 6. as to this poin: is held not to be law.

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(1) The feoffee ought to execute it *and take poſſeſſion preſently*, or the livery will not avail him; becauſe a frank-tenement cannot be in abeyance. *Mo.* 85. It is ſaid it will be good if the feoffee enters in the life of the feoffor, altho' the feoffee be a woman, and married before her entry, to the feoffor, or any other who enters and claims in right of his wife. *Parſons* v. *Perns*, 1 *Mod.* 91.

(2) For it will be a good execution of the livery and veſt the frank-tenement in him. *Co. Lit.* 48. b. ſee further as to the perfection of livery within view, in *Bac. Abr.* Feoffment (A. 2.) *Vin. Abr.* Feoffment (I.) and *Com. Dig.* Feoffment (B. 4.)—by what act livery within the view may be countermanded, ſee *Vin. Abr.* Feoffment (P. 2.)

(3) A man may either give or receive livery by his attorney; for ſince a contract is no more than the conſent of a man's mind to a thing, where that conſent or concurrence appears, it were moſt unreaſonable to oblige each perſon to be preſent at the execution of the contract, ſince it may as well be performed by any other perſon delegated for that purpoſe by the parties to the contract.—But ſuch delegation or authority, to give or receive livery, muſt be by deed, that it may appear to the court, that the attorney had a commiſſion to repreſent the parties that are to give or take livery, and whether the authority was purſued. *Bac. Abr.* Feoffment (E.)

donor, *&c.* who doth give the authority. 5. That it be done in the life-time of the parties. But a livery in law may not be made by an attorney. And therefore if a letter of attorney be to deliver ſeiſin generally, and the attorney by virtue thereof deliver ſeiſin in view; this livery of ſeiſin is void (1).

Bro. Feoffments. 25. Aſſ. pl. 4. Perk. Sect. 23.

If an infant, or woman covert, make a feoffment and letter of attorney to make livery, and the attorney do ſo; this is void, for they are not able to give ſuch an authority. And if a man whilſt he is of ſound memory, make a feoffment with a letter of attorney to give livery, and after he become paralytick and ſo dumb, but by ſigns he doth declare himſelf to be willing to have livery of ſeiſin made, and it is made; this is a good livery of ſeiſin. But if a letter of attorney be made to deliver ſeiſin of certain land by one that is *non ſanæ memoriæ*, and the deed of feoffment was made whilſt he was of ſound memory, and afterwards he doth come to his memory again, and then the livery is made upon the firſt warrant without any new aſſent, *&c.* in this caſe the livery is not good.

Infant. Woman covert.

Non ſanæ memoriæ

Dier 283.

That for the moſt part, which for the manner and order of making it is a good livery of ſeiſin if it be made and taken by the parties themſelves, is good being made and taken by their attornies or deputies that have a good authority and do well purſue it. And therefore if the conveyance be made of divers lands, and they lie in one county, and a warrant of attorney is made to give livery generally, and the attorney doth make it in one part of the land in the name of all the reſt; this is a good livery. *Et ſic de ſimilibus.*

Co. ſuper Lit. 52.

* If a man be ſeiſed of black acre, and white acre, and he make a deed of feoffment of both theſe acres, and a letter of attorney to enter into both theſe acres, and to deliver ſeiſin of both of them according to the form and effect of the deed, and he doth enter into black acre and deliver ſeiſin *ſecundum formam chartæ*; in this caſe, the livery of ſeiſin is good, albeit he doth not enter into both the acres, nor into one acre in the name of both. And if the feoffment be made to two or more, and the warrant of attorney is to make livery to them both, and the attorney doth make livery of ſeiſin to one of the feoffees *ſecundum formam & effectum chartæ*; in this caſe the livery is good to both, and yet he that is abſent may wave the livery.

* P. 218.

Co. ſuper Lit. 52. 258. Perk. Sect. 187, 188, 189.

And yet if a man be diſſeiſed of black acre and white acre, and a warrant of attorney is made to one to enter into both theſe acres, and to make livery, and the attorney doth enter into one acre only, and make livery of ſeiſin there *ſecundum formam chartæ*; in this caſe the livery of ſeiſin is void for all, for in this caſe he doth leſs than his authority. So if a man make a letter of attorney to deliver ſeiſin to *I. S.* upon condition, and the attorney doth deliver ſeiſin abſolutely; this livery of ſeiſin is void. And ſo in all ſuch like caſes where the attorney doth leſs than the authority and commandment, all that he doth is void. But for the moſt part where the attorney doth that which he is authoriſed to do, and more alſo, it is good for ſo much as is warranted, and void for the reſt. And

(1) An attorney cannot make livery in view, becauſe his warrant is intended of an actual and expreſs livery, and not of a livery in law. *Co. Lit.* 52. 2 *Roll Abr.* 9. An attorney cannot make a letter of attorney to another to give livery 18 *E.* 4. 12. b. 19 *H.* 8. 10. 2 *Roll. Abr.* 9. See further in *Noy's Max.* 161.

therefore if the letter of attorney be to give livery of seisin to *I. S.* and the attorney give it to *I. S.* and *W. S.* this livery is good to *I. S.* and void to *W. S.* So if the letter of attorney be to give livery of seisin of white acre only, and he make livery of white acre and black acre also; this livery is good for white acre, and void for black acre. So if the letter of attorney be absolute, and the attorney give livery upon condition; some hold this to be good, and the condition to be void. Perk. Sect. 109. Co. super Lit. 258.

If a letter of attorney be made to two jointly, to make or take livery of seisin, and one of them alone doth it without the other; this is a void livery. But otherwise it is when it is made to two jointly or severally, for there one of them alone may do it (1). Co. super Lit. 49.

If a letter of attorney be to make livery of seisin after the death of another man, and the attorney doth make livery of seisin during that man's life; this livery is void (2). Perk. Sect. 39.

11. How it shall enure, and be taken and construed.

Livery of seisin is sometimes made single, and without any relation to the deed, whereby the estate upon which the livery is made, is created, at all: and sometimes, and most commonly, it is made with reference to the deed in these, or such like words, [*secundum formam chartæ*]. In the first case the estate is oftentimes made upon the livery; and then there may be one estate contained in the * deed, and another made by the livery; also there may pass more land by the livery than is in the deed, and by this means when there is a fault in the deed, so that the land will not pass by the deed, it may perhaps pass by the livery: but in this case then there must be apt words used in the making of the livery to create the estate also, as well as to give the possession. But where the livery of seisin is made with relation to the deed, there it must take effect according to the deed or not at all; for these words *secundum formam chartæ*, are to be understood according to the quantity and quality of the effectual estate contained in the deed. And therefore if one make a deed of feoffment to another, and in the deed there is contained no condition at all, and when the feoffor doth make livery he doth make livery upon condition; or if the deed contain an estate to him and his heirs, and he maketh livery of an estate in tail or for life; in these cases there doth pass nothing by the deed. And yet if there be apt words used to create such an estate at the time of the livery made; such an estate may be made by the livery without the deed, and then the deed shall be void. But if in these cases the feoffor say, when he doth make livery on condition in tail, or for life, *secundum formam chartæ*; in this case there is a good feoffment made according to the deed, and the additional words are void. So if a man make a lease for years, and make livery *secundum formam chartæ*; this is but a lease for years still. And if *A.* give land to *B.* to have and to hold after the death of *A.* to *B.* and his heirs; this is a void deed; and therefore Lit. Sect. 359. Co. super Lit. 48. 122. Fitz. Estoppel 177. 17 Ed. 4. 25. Co. super Lit. 49. Fitz. Feoffments & faits 23.

* P. 219.

(1) If a letter of attorney be made to three *conjunctim et divisim*, and two of them only make the livery, it is not good, because not pursuant to the authority; for the delegation was to them all three, or to each of them separately; but if the third was present at the time of the livery, though without doing or saying any thing, it is good. *Dier* 62. a, see further *Mo.* 278. 1 *Leon.* 192.

(2) See more amply as to the doctrine of livery by letter of attorney, in *Vin. Abr.* Feoffment (Q.) *Com. Dig.* Feoffment (B. 3.)—and note 2 to 13th edition *Co. Lit.* 52. a.

if the livery of ſeiſin be made *ſecundum formam chartæ*, the livery of ſeiſin is void alſo. But if when he doth give livery of ſeiſin, he give it to him and his heirs without theſe words *ſecundum formam, &c.* or if in the making of livery he ſay, here I deliver you ſeiſin of this land, to have and to hold to you and your heirs for ever, or the like; this may make a fee ſimple. And ſo if one make a deed of feoffment of two acres, and after make livery of ſeiſin of four acres; in this caſe if there be words in the livery of ſeiſin ſufficient to make a new eſtate, the other two acres may paſs alſo.

Co. 2. 55. 5. 94. & Greenwood's caſe, B. R. Mich. 17 Jac.

If *A.* by deed give land to *B.* to have and to hold after the death of *A.* to *B.* and his heirs; this is a void deed; and therefore if upon this deed, livery of ſeiſin be made before the day, by the party himſelf, or at, or after the day by his attorney *ſecundum formam & effectum chartæ*; the livery is void alſo, for it cannot enure ſo. And yet if a leaſe be made for life to begin *in futuro*, and at, or after the day come, the leſſor himſelf in perſon doth make livery of ſeiſin *ſecundum formam chartæ*; in this caſe the leaſe perhaps may become good by this livery of ſeiſin.

Co. ſuper Lit. 222.

If an agreement be between two that the one ſhall infeoff the * other upon condition for ſurety of money, and afterwards livery of ſeiſin is made generally without any ſuch condition; in this caſe it is ſaid by ſome the eſtate ſhall be on condition ſtill.

* P. 220.

Perk. Sect. 42.

If there be a fault in the deed, as by the miſ-naming of the feoffor, *&c.* feoffee, *&c.* or the like, and afterwards the feoffor, *&c.* doth himſelf in perſon make livery of ſeiſin upon this deed to the feoffee, *&c.* by this the fault of the deed may be holpen and cured.

Perk. Sect. 204, 203. 7 H. 7. 9.

If one make a feoffment to himſelf and another, and give livery of ſeiſin to the other; this is a good feoffment, and ſhall enure to the other wholly, and he ſhall take the whole by the feoffment and the livery. And ſo if the livery be made to one that is capable, and to another that is not capable; he that is capable ſhall take the whole, and the other ſhall have nothing. So if a feoffment be made to two, and one of them die before the livery is made, and after the livery is made to the ſurvivor; in this caſe the livery ſhall enure to the ſurvivor only, and he ſhall have all the eſtate thereby. So if a feoffment be made without deed to a corporation and to *I. S.* and livery is made to *I. S.* alone; in this caſe *I. S.* ſhall have the whole and the corporation nothing at all.

Dier 35. 10 E. 4. 1. Co. 5. 95.

If a feoffment be made to four, and livery of ſeiſin is made to one, two, or three of them; this ſhall enure to them all. But if the feoffment be without deed, it ſhall enure to him wholly to whom the livery is made. And if one of them give warrant to the reſt to take livery for him, and they do ſo; this ſhall enure to them wholly, and not to him at all for any part.

10 E. 4. 12.

If the tenant make a feoffment to his Lord and another, and give livery of ſeiſin to the other; this ſhall enure wholly to the other until the Lord agree to it, and then to them both.

Co ſuper Lit. 21.

If one make a deed of feoffment of one acre of land to *A.* and his heirs, and another deed of the ſame land to *A.* and his heirs of his body, and deliver ſeiſin according to the form and effect of both deeds; in this caſe it ſhall enure by moieties, *i. e.* he

he ſhall have an eſtate tail, and the fee ſimple expectant in the moiety, and a fee ſimple in the other moiety.

If two ſeveral deeds of feoffment be made to two ſeveral perſons of one and the ſame thing; he that can get the ſeiſin firſt ſhall have it. *Rem domino, vel non domino, vendente duobus, in jure eſt potior traditione prior.*

If leſſee for life make a feoffment, and a letter of attorney to the leſſor to make livery, and he doth make livery accordingly; in this caſe this ſhall not enure to bar him of his entry upon the feoffee for the forfeiture of his leſſee. But if leſſee for years make a feoffment in fee, and ſuch a letter of attorney to the leſſor, and he doth deliver ſeiſin accordingly; this livery ſhall bind him, for it ſhall be ſaid as in his own right, becauſe the leſſee had no freehold whereof to make livery. Co. ſuper Lit. 52.

* P. 221. * If a leſſor make a deed of feoffment, and a letter of attorney to the leſſee for years to give livery, and he doth it accordingly; this ſhall not be conſtrued to extinguiſh or hurt his term (1). See more in *Expoſition of deeds, ſupra, ch.* 5. Co. ſuper Lit. 52.

And ſo we come to another kind of deed of common aſſurance, called a *bargain and ſale*.

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(1) See more amply in *Com. Dig.* Feoffment (B. 5.) *Vin. Abr.* Feoffment (L.) 1 *Wood* 526. *Bac. Abr.* Feoffment (B.)—In what caſes livery ſhall be preſumed at law, or ſupplied in equity, ſee before in page 205, note 1, and further in 1 *Wood* 529. *Vin. Abr.* Feoffment (F. a.)

The reader, it is preſumed, from peruſing this chapter, and conſulting the authors referred to in it, muſt be well convinced of the excellent nature of the conveyance by *feoffment with livery of ſeiſin.* This conveyance is now but very little uſed (as was obſerved before in note 1, to p. 200.) but it is ſtill nevertheleſs a formal, valid, and effectual mode of conveyance; it has however been of late years almoſt entirely ſuperſeded by the conveyance by *leaſe and releaſe.*—The editor apprehends he cannot explain this circumſtance, and the origin and nature of the conveyance by *leaſe and releaſe*, more ſatisfactorily to the reader, than by ſelecting particular paſſages from ſome of our moſt reſpectable legal writers, in the order of time in which they have written concerning it.—Ld. *Bacon* in his Treatiſe on the uſe of the law, *p.* 154. ſpeaking of the inconveniencies of the putting lands into uſe before the ſtatute of uſes, and the frauds which were occaſioned thereby, ſays, that "in the end of 27 *H.* 8. the parliament purpoſing to take away all thoſe uſes, and reduce the law to *the* "*ancient form of conveying of lands by publick livery of ſeiſin*, fine, and recovery, did ordain, that where lands were "put in truſt or uſe, there the poſſeſſion and eſtate ſhould be preſently carried out of the friends in truſt, "and ſettled and inveſted on him that had the uſes, for ſuch term and time as he had the uſe."

In *Dalrimple* on Feuds, p. 210, it is ſaid, in England, although originally conveyances by deed of party were executed by acts of infeoffment; which, as will appear from a compariſon of *Madox* and *Craig*, correſpond in their nature and progreſs to our *(Scottiſh)* charter and ſeiſin; or by fines, which were originally an acknowledgment of ſuch feoffment in a court of record; yet, earlier than the time of *Littleton*, it had come into faſhion, to tranſmit land by *attornment*, if there was a tenant, and by *leaſe and releaſe*, if there was none; in the firſt of which caſes, the form of getting the conſent of the tenant of the ground to the transfer ſupplied the place of that livery, which could not be given; and, in the other caſe, the grantor gave to the grantee an imaginary leaſe, in order to put him into poſſeſſion, and the next minute releaſed; or, in the language of the law of *Scotland*, renounced all right or intereſt he had in the land.

In attornment ſomething was done to ſupply the want of livery, and in leaſe and releaſe the entry gave livery; but a ſtatute of *Henry* 8. by making proviſions concerning a form of conveyance, which had been before in uſe, enabled people to diſpenſe with theſe two ſhadows of a form, and with the circuit of a feoffment altogether. The form of conveyance by bargain and ſale, made ſecure by writing and enrolment, by virtue of this ſtatute, correſponds to the diſpoſition without infeoffment in *Scotland:* This laſt with us doth not transfer; it is only a ſtep to the transfer; but in *England*, on a bargain and ſale, all notion of a ſuperior or delivery is loſt: the moment the deed is inrolled, the eſtate, to almoſt all effects whatever, is veſted *ab initio*; nor can there be any diſpute between competitor purchaſers, except what ariſes from the dates of their reſpective inrolments.

In 1 *Wood's* Conveyancing, p. 714, a conveyance by leaſe and releaſe is deſcribed to be, where he who is to convey any lands or tenements firſt makes a *leaſe*, (or *bargain and ſale*) of the premiſes to the perſon to whom the ſame is to be conveyed for ſix months, a year, *&c.* but uſually for a year, to the intent that by virtue thereof the leſſee may be in the actual poſſeſſion of the premiſſes granted by the leaſe, (or bargain and ſale) and intended to be releaſed to him; and then the leſſee (or bargainee) by virtue of the ſtatute of the 27 *H.* 8. *c.* 10. for transferring uſes into poſſeſſion, is enabled to take a grant or releaſe of the reverſion or inheritance of the ſaid lands, to the uſe of himſelf and his heirs for ever, *&c.* and then a *releaſe* (uſually dated the day next after the date of the leaſe, reciting the ſaid leaſe and declaring the uſes) is accordingly made; which in this caſe is a conveyance of one's right or intereſt that he has in a thing to another who has the poſſeſſion thereof.

A leaſe and releaſe are but one conveyance, and in the nature of one deed, 2 *Mod.* 252. Leaſe and releaſe is now become the moſt common conveyance of lands. It amounts to a *feoffment*; for by the ſaid ſtatute the *uſes* are transferred into the *poſſeſſion*, ſo that thereby the place of *livery of ſeiſin* is ſupplied; which indeed ſaves much trouble, eſpecially when the bargainor, *&c.* lives at a diſtance from the premiſſes: in which caſe a letter of attorney to make livery was obliged to be made; otherwiſe the bargainor, *&c.* was to deliver ſeiſin in perſon.

Mr. Juſtice *Blackſtone* treating of the ſtatute of uſes (in the ſecond volume of his commentaries p. 337.) ſays, the only ſervice to which that ſtatute is now conſigned is in giving efficacy to certain new and ſecret ſpecies of conveyances; introduced in order to render tranſactions of this ſort as private as poſſible, and to ſave the trouble of making livery of ſeiſin, the only antient conveyance of corporeal freeholds: the ſecurity and notoriety of which public inveſtiture abundantly overpaid the labour of going to the land, or of ſending an attorney in one's ſtead. And in the ſame volume p. 339. deſcribing the conveyance by leaſe and releaſe ſays, that mode of conveyance was firſt invented by ſerjeant *Moore*, ſoon after the ſtatute of uſes, and now the moſt common of any, and therefore not to be ſhaken; though very great lawyers (as particularly Mr. *Noy*) have formerly doubted it's validity. It is thus contrived. A leaſe or rather bargain and ſale upon ſome pecuniary conſideration, for one year, is made by the tenant of the freehold to the leſſee or bargainee. Now this, without any enrollment, makes the bargainor ſtand ſeiſed to the uſe of the bargainee, and veſts in the bargainee the *uſe* of the term for a year; and then the ſtatute immediately annexes the *poſſeſſion*. He therefore, being thus in poſſeſſion, is capable of receiving a releaſe of the freehold and reverſion; which, we have ſeen before, muſt be made to a tenant in poſſeſſion; and accordingly, the next day, a releaſe is granted to him. This is held to ſupply the place of livery of ſeiſin; and ſo a conveyance by leaſe and releaſe is ſaid to amount to a feoffment.

Mr. *Hargrave* in note 3. to the 13th edition *Coke Littleton* 48. a. ſays—but ſince the introduction of uſes and truſts and the ſtatute of 27 *H.* 8. for transferring the poſſeſſion to the uſe, the neceſſity of livery of ſeiſin for paſſing a freehold in corporeal hereditaments has been almoſt wholly ſuperſeded, and in conſequence of it the conveyance by feoffment is now very little in uſe. Before the ſtatute of uſes *equitable* eſtates of freehold might be created through the *medium* of truſts without livery, and by the operation of the ſtatute *legal* eſtates of freehold may now be created in the ſame way. Thoſe who framed the ſtatute of uſes evidently foreſaw, that it would render livery unneceſſary to the paſſing of freehold, and that a freehold of ſuch things as do not lye in grant would become transferrable by *parol* only without any ſolemnity whatever. To prevent the inconveniencies, which might ariſe from a mode of conveyance ſo uncertain in the proof, and ſo liable to miſconſtruction and abuſe, it was enacted in the ſame ſeſſion of parliament, that an eſtate of freehold ſhould not paſs by bargain and ſale only, unleſs it was by indenture inrolled. See 27 *H.* 8. *c.* 16. The objects of this proviſion evidently were, firſt, to force the contracting parties to aſcertain the terms of the conveyance by reducing it into writing; ſecondly, to make the proof of it eaſy by requiring their ſeals to it, and conſequently the preſence of a witneſs; and laſtly, to prevent the frauds of ſecret conveyances by ſubſtituting the more effectual notoriety of inrollment for the more ancient one of livery. But the latter part of this proviſion, which if it had not been evaded would have introduced almoſt an univerſal regiſter of conveyances of the freehold in the caſe of corporeal hereditaments, was ſoon defeated by the invention of the conveyance by leaſe and releaſe, which ſprung from omitting to extend the ſtatute to bargains and ſales for terms of years; and the other parts of the ſtatute were neceſſarily ineffectual in our courts of equity, becauſe theſe were ſtill left at liberty to compel the execution of truſts of the freehold though created without deed or writing. The conveyances from this inſufficiency of the ſtatute of inrolments are now in ſome meaſure prevented by the 29 *Cha.* 2. *c.* 3. which provides againſt conveying any lands or hereditaments for more than three years, or declaring truſts on them, otherwiſe than by writing. See further as to the nature and operation of the conveyance by leaſe and releaſe, in the caſe of *Barker* v. *Keat*, 2 *Mod.* 249.—*Shortridge* v. *Lamplugh*, Ld. *Raym* 798.—*Lilly's Pract. Convey.* 227. *Bac. Abr.* Releaſe (C. 4.)—*Zouch* v. *Parſons.* 3 *Burr.* 1794. *Vin. Abr.* Deeds (D.)

CHAP. X.

Of a Bargain and Sale.

1. Bargain and ſale. *Quid.*

THIS word doth ſignify the transferring of the property of a thing, from one to another, upon valuable conſideration. And herein only it doth differ from a gift; that this may be without any conſideration or cauſe at all, and that hath always ſome meritorious cauſe moving it, and cannot be without it. This word alſo is ſometimes applied to the aſſurance or conveyance whereby this is done and made, which is called a deed of bargain and ſale, for this may be done by writing or without writing (1). Terms of the law, Plow. 301. Co. 2. 35.

2. *Quotuplex.*

And ſometimes this is and may be of lands, tenements, and hereditaments, and to this the term is moſt properly applied. And then it is ſaid to be, where a recompence is given by both parties to the bargain. As where one doth bargain and ſell his land to another for money; in this caſe the land is a recompence to the one for the money, and the money to the other for the land. And this now alſo is become one of the common aſſurances of the kingdom; ſo that ſuch an aſſurance may now be averred to be fraudulent within the ſtatute of 27 *Eliz.* as well as any other aſſurance, a rent may be reſerved upon it, or a condition made by it, as well as by any other kind of aſſurance. And ſometimes this is and may be of moveable things, as trees, corn, graſs, oxen, kine, houſhold-ſtuff, and the like: the property whereof is and may be altered by this kind of conveyance, as well as by gift, or grant. And this kind of bargain and ſale is that which is commonly called a contract: which, largely taken, is an agreement between two or more concerning ſomething to be done, whereby both parties are bound each to other, or one is bound to the other. But ſtrictly, it is the buying and ſelling of ſome perſonal goods whereby the property is altered. And in both theſe caſes he that doth ſell is called the bargainor, and he to whom the ſale is made is called the bargainee. Terms of the law, Plow. 301. Co. 2. 35. Per Chief Juſt. Hide 3 Car. Co. 2. 54. Terms of the law. Agreement

Bargainor. Bargainee.

3. The effect of it.

The effect of this is to transfer the property; and this it will as effectually do as any other kind of conveyance whatſoever. And therefore the bargainee of a reverſion, howſoever he may not have * benefit of a condition upon the demand of a rent without giving notice of the bargain and ſale to the leſſee; and howſoever if *A.* conuſee by a fine of a reverſion, before attornment of the tenant bargain and ſell the reverſion to *B.* that *B.* cannot diſtrain for this rent until he can get an attornment of the tenant; yet the bargainee ſhall have benefit of a condition as an aſſignee within the ſtatute of 32 *H.* 8. Co. 8. 94. 5. 113. 3. 62.

* P. 222.

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(1) Bargain and ſale is termed a *real contract* on a valuable conſideration, for paſſing manors, lands, tenements or hereditaments, by deed indented and inrolled within ſix months after the date thereof, without livery of ſeiſin, or attornment of tenants. 2 *Inſt.* 672. Bargain and ſale is a contract in conſideration of money, paſſing an eſtate in lands and tenements by deed indented and inrolled: this manner of conveying lands is created and eſtabliſhed by the 27 *H.* 8. *c.* 10. which executes all uſes raiſed; and as this has introduced a more ſecret way of conveyancing than was known to the policy of the common law, therefore the inrolment of the deed of bargain and ſale was made neceſſary by the 27 *H.* 8. *c.* 16. *Bac. Abr.* Bargain and Sale. See further in *Lilly's Conv.* 12. and 1 *Wood* 650.

And

And it ſeems he may vouch by force of a warranty annexed to the eſtate of the land, becauſe he is in partly in the *per*, and partly in the *poſt* (1).

See Weſt Symb. tit. Bargain and Sale.

4. Of what things a bargain and ſale may be: or nöt.

All things for the moſt part, that are grantable by any other way from one man to another, are grantable and may be tranſferred by way of bargain and ſale from one to another. And therefore lands, rents, advowſons, commons, tithes, profits of courts, and the like, may be granted by way of bargain and ſale in fee ſimple, fee tail, for life, or years. And all manner of goods and chattels, as leaſes for years, wardſhips, cattle, corn, houſhold-ſtuff, wood, trees, merchandiſes, and the like, are grantable by way of bargain and ſale (2). But it ſeems eſtovers, and ſuch like things *de novo*, and that have not eſſence before, are not grantable by way of bargain and ſale, as they are by way of grant or leaſe, and therefore that a bargain and ſale of ſuch things is void (3).

6 Jac. B. R. Adjudged 21 H. 6. 43. per Yelverton.

Stat. 27 H. 8. ch. 16.

5. What ſhall be ſaid a good bargain and ſale: and what things are requiſite to make ſuch a bargain and ſale: or not.

Of lands.

If any eſtate of freehold or inheritance be made of land by way of bargain and ſale, the ſame muſt be made by a writing or deed indented (4), and cannot be made by word of mouth only, as a leaſe for years, whether it be created *de novo*, or be in *eſſe* before, may be. But lands in *London* by a ſpecial proviſo within the ſtatute may be bargained and ſold by word of mouth without any writing (5). 2. The very words bargain and ſell, are not neceſſary to a good bargain and ſale; for words equivalent will ſuffice to make land paſs by way of bargain and ſale. And therefore if a man ſeiſed of land in fee do by deed indented, and by the words alien or grant, ſell them to another; or if ſuch a man covenant to ſtand ſeiſed of his land to the uſe of another; and theſe deeds are made in conſideration of money, and the deeds be after inrolled; theſe will amount to good bargains and ſales. And if a man by a deed indented and inrolled in conſideration of ten pounds paid to him, by the words, demiſe and grant, paſs his lands to another for twenty years; this is a good bargain and ſale (6).

Co. 8. 94. 7. 40. 2. 36.

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(1) It is ſaid that a *bargain and ſale* is not ſo ſtrong a conveyance as a livery; for if I have a rent charge in right of my wife out of the manor of *D.* and afterwards I purchaſe the manor, and afterwards by deed indented and inrolled I bargain and ſell the manor, the rent charge ſhall not paſs. 1 *Leon.* 6. By *feoffment* or *fine* all uſes and poſſibilities are conveyed by reaſon of the forceable operation, but it is otherwiſe by *bargain and ſale*. See 1 *Leon.* 33.—The bargain and ſale veſts the uſe, and the ſtat. of uſes the poſſeſſion. *Cro. Jac.* 696. A bargain and ſale does not paſs away nor affect a *contingent* uſe in the bargainor: but a feoffment or fine would transfer it. *Hardr.* 416. See more amply as to the operation of a bargain and ſale, 1 *Wood* 651. *Com. Dig.* Bargain and Sale (B. 3.). 2 *Bl. Com.* 338. *Vin. Abr.* Deeds (A).

(2) As to bargains and ſales of goods and chattles, ſee *Com. Dig.* Bargain and Sale (A.) Biens (D. 3.) Grants (C).

(3) *A.* by indenture inrolled bargains and ſells to *B.* in fee with a way over other lands of *A.* the deed was held to be void as *to the way*, for nothing but the uſe paſſed by the deed, and there cannot be an uſe of a thing which is not in *eſſe*, as a way, common, *&c.* which are newly created, and until they are created, no uſe can be raiſed by bargain and ſale. *Cro. Jac.* 189. See further what may be bargained and ſold, *Bac. Abr.* Bargain and Sale (B). *Com. Dig.* Bargain and Sale (B.) *Vin. Abr.* Bargain and Sale (G).

(4) And not by *print* or *ſtamp*, and it muſt be written on *parchment* or *paper*, and not upon wood, ſtone, lead, or other material. 2 *Inſt.* 672.

(5) For a valuable conſideration; lands in the city of *London* being exempted out of the ſtatute 27 *H.* 8. *c.* 16. and at the common law ſuch a bargain and ſale by word only raiſed an uſe, and the ſtat. 27 *H.* 8. *c.* 10. transfers the uſe into poſſeſſion. 2 *Inſt.* 275. *Vin. Abr.* Deeds (H).

(6) See accordingly the words *demiſe* and *grant* adjudged a good bargain and ſale without other words. 1 *Vent.* 141. See alſo *Taylor* v. *Vale*, *Cro. Eliz.* 166. and *Cro. Jac.* 210. but tho' the words *bargain and ſale* are acknowledged by Lord *Coke* not to be abſolutely neceſſary, yet he ſays it is good to make uſe of them, they being contained in the act. 2 *Inſt.* 672.

3. There must be some good consideration given, or at least said to be given for the land. And therefore if *A.* (for divers good considerations) [a] or (in consideration that the bargainee is bound for the bargainor, and for divers other good causes) [b] or (for divers great and valuable considerations) bargain and sell his land by deed indented and inrolled to *B.* and his heirs; *nihil operatur*. But if in these cases in truth there be money or other good consideration given, albeit it be not expressed upon the deed * the bargainee may aver it, and being proved, the bargain will be good. And if the deed make mention of money paid, as in consideration of an hundred pounds, or the like, and in truth no money is paid, yet the bargain and sale is good. And no averment will lie against this which is expressly affirmed by the deed. And if the deed mention and say (for a certain sum of money) or (for a certain competent sum of money) these are good considerations (1). 4. There needs no livery of seisin or attornment in this case. And therefore if one bargain and sell a reversion by deed indented and inrolled, for good consideration; the reversion will pass without any attornment of the tenant. And if it be only a lease for years of a reversion that is granted, there needs no attornment nor inrolment. And in case of a bargain and sale, the bargainee is in actual possession before any entry, so that the lessee may attorn to the grant of the reversion, as hath been ruled in *Mitton's* case *Mich.* 18 *Jac. in Cur' Ward*, by the two Chief Justices and the whole court. And yet I think he hath not such a possession as to bring any possessory action for trespass, or the like, until an actual entry: for where the statute of 27 *H.* 8. of uses provides, that the actual possession shall be adjudged according to the use, yet it ought to have a circumstance which is requisite by the common law, *viz.* an actual entry in deed. But there must be an inrolment of the deed in case where any freehold doth pass (2): for it is provided, that no lands (except in some corporations only) shall pass from one to another by any deed whereby any estate of inheritance or freehold shall be made, or take effect in any person or persons, by reason only of any bargain and sale thereof, except the same be made and done by writing indented, sealed and inrolled in one of the four courts [the Chancery, King's Bench, Common Pleas, or Exchequer, or else within the same county or counties where the lands so bargained and sold, do lie, before the *Custos Rotulorum*, and two justices of the peace, and the clerk of the peace of the same county or counties, or two of them at the least, whereof

[a] Ward v. Lambert Pasche 37 Eliz. 41 El. Adjudged.

[b] Dier 169.

Co. 1. 176.

* P. 223. Averment.

Dier 90.

Co. 7 40. 8. 94.

Co. 5. 112.

Stat. 27 H. 8. ch. 16. Pl. 307.

Inrollment, where necessary: and how it must be done.

(1) If I bargain and sell land to my son, no uses arise unless there be a consideration of money; for selling, *ex vi termini*, supposes my transferring a right of something for money, the common medium of commerce. And if there be no such consideration, it may be an exchange, a covenant to stand seized, a grant &c. but it can be no sale. Treatise of equity p. 56. If the *deed expresses for a competent sum of money*, tho' the certainty of the sum be not mentioned, it is good enough; for against this express mention in the deed no averment nor evidence shall be admitted. *Mo.* 569. *Fisher* v. *Smith*. See more amply what shall be a sufficient consideration, in *Com. Dig.* Bargain and Sale (B. 11.) *Bac. Abr.* Bargain and Sale (D).

(2) And until the inrolment the *lands remain in the bargainor*; for the bargain and sale on the statute 27. *H.* 8. *ch.* 16. is but *inchoatum* and *non perfectum*, and gives nothing to the bargainee *till the deed is inrolled*, according to the statute *Vin. Abr.* Deeds (N.) the statute of inrolment extends only to a bargain and sale of an estate of freehold, and the omission in that statute (it not being made to extend to bargains and sales for terms of years) has occasioned the invention of the conveyance by lease and release, now so universally in practice, as was before observed, in page 217.

the clerk of the peace to be one (1). And the ſame inrolment to be within ſix months next after the ſame writing or deed is dated. And this ſtatute was made in the ſame parliament wherein the law of transferring of uſes into poſſeſſion was made, to the end that men's lands might not ſuddenly and privately paſs upon payment of a little money in an alehouſe, or the like. And herein theſe things muſt be obſerved, 1. The inrolment upon ſuch a deed as to make the eſtate to paſs, muſt be in parchment; for an inrolment in paper is not good (2). 2. The deed inrolled muſt be indented; for if it be but poll, the eſtate will not paſs. 3. It muſt be inrolled within ſix months of the purchaſe or ſale. And this account muſt be. 1. From the date, and not from the time of the * delivery of the deed. 2. After twenty eight days to the month and no more (3). 3. The day of the date to be taken excluſive, and for none of the days of the ſix months. And yet if a deed be inrolled the ſame day it bears date it, is good. 4. If it be inrolled any part of the laſt day of the ſix months, it is ſufficient. And thus the deed may be inrolled within the ſix months, albeit either of the parties die within the time. And if the deed be not thus inrolled, it is of no force at all (4). So that if one bargain and ſell his land to me, and the trees upon it; in this caſe, albeit the trees might have been ſold alone by deed without

Co. 5. 1.

2] Dier 218. Adjudged Franklin & Garter's caſe Mich. 37. & 38 Eliz.

4] Dier 218. Ruled in the court of Wards. Co. 11. 48.

* P. 224.

(1) By the ſtat. 5th. *Eliz. c.* 26. bargains and ſales may be inrolled in the counties palatine of *Lancaſter*, *Cheſter*, and the biſhoprick of *Durham*, of manors, lands, *&c.* within the county of *Lancaſter*, the county of *Cheſter*, or the county of the biſhoprick of *Durham* reſpectively.—By 5th. *Anne ch.* 18. bargains and ſales of any manors, lands, *&c.* within the *Weſt-riding* of the county of *York*, which ſhall be inrolled before the regiſter for the ſaid *Weſt-riding*, or his deputy for the time being, in the public office at *Wakefield*, ſhall be as good and available, as if the ſame had been inrolled in one of the King's courts of record at *Weſtminſter*, or before the *Cuſtos Rotulorum*, and two juſtices of the peace, and the clerk of the peace of the ſaid *Weſt-riding*, or two of them, according to the act of the 27th. *H.* 8.—By the 6th. *Ann. c.* 35. §. 16. The like proviſion is made for inrolling bargains and ſales in *Beverley* of lands within the *Eaſt-riding* of the county of *York*, or the town and county of the town of *Kingſton upon Hull*; and by the 30th. *ſect.* of that ſtat. it is enacted, "that in all deeds of bargain and ſale inrolled in purſuance of that act, whereby any eſtate of *inheritance in fee ſimple* is limited to the bargainee and his heirs, the words *grant*, *bargain and ſell*, ſhall amount "to, and be conſtrued and adjudged in all courts of judicature, to be expreſs covenants to the bargainee, his "heirs and aſſigns, from the bargainor for himſelf, his heirs, executors, and adminiſtrators, that the "bargainor, notwithſtanding any act done by him, was at the time of the execution of ſuch deed ſeized of "the hereditaments and premiſes thereby granted, bargained and ſold, of an indefeaſible eſtate in fee ſimple, "free from all incumbrances (rents and ſervices due to the Lord of the fee only excepted) and for quiet "enjoyment thereof againſt the bargainor, his heirs and aſſigns, and all claiming under him, and alſo for "further aſſurance thereof to be made by the bargainor, his heirs and aſſigns, and all claiming under him; "unleſs the ſame ſhall be reſtrained and limited by expreſs particular words contained in ſuch deed; and "that the bargainee, his heirs, executors, adminiſtrators and aſſigns reſpectively, ſhall and may, in any "action to be brought, aſſign a breach or breaches thereupon, as they might do in caſe ſuch covenants were "expreſsly inſerted in ſuch bargain and ſale."—By the 8th. *Geo.* 2. *c.* 6. §. 21. the inrolment of bargain and ſales of lands in the *North-riding* of the county of *York* is authorized in the regiſter office for that Riding.—By the 33 *Geo.* 2. *c.* 30. §. 10. being an act for widening certain ſtreets, *&c.* in *London*, it is enacted, that all bargains and ſales made and acknowledged by any perſon or perſons whomſoever, and *which ſhall be inrolled in the huſtings of the ſaid city*, of any lands, tenements, and hereditaments, purchaſed by virtue of and for the purpoſes of that act, ſhall have the force, effect and operation in law, to all intents and purpoſes, which any fine or fines, recovery or recoveries whatſoever, would have, if levied or ſuffered by the bargainor or bargainors, or any perſon or perſons ſeized of any eſtate in the premiſſes, in truſt for, or to the uſe of, ſuch bargainor or bargainors, in any legal manner or form whatſoever.

(2) And by the 10th. *Ann. c.* 18. §. 3. a copy of the inrolment of a bargain and ſale, examined with the inrolment, and ſigned by the proper officer, having the cuſtody of ſuch inrolment, and proved upon oath to be a true copy ſo examined and ſigned, ſhall, in all caſes where a bargain and ſale ſhall be pleaded with a *profert in curia*, be of the ſame force and effect, as the indenture of bargain and ſale ſhould be, if the ſame was produced.

(3) See accordingly 2 Inſt. 274.

(4) But if it is ſo made and duly inrolled, it is not effectual if the bargainor had any legal diſability, for if an infant bargains and ſells lands by deed indented and inrolled, *he may avoid it when he will* (altho', in the caſe of a fine he muſt reverſe it during his minority) for this deed was of no effect to raiſe an uſe, and the ſtatute of inrolments is intended only of effectual bargains and ſales. 2 *Inſt.* 673.—As to inrolments in various places, and the different forms of inrolments, ſee *Lilly's* Convey. 21. *Vin. Abr.* Deeds (K.) 1 *Wood* 654.

inrollment, yet now being not inrolled, becauſe the ſale is not good for the land, it ſhall not be good for the trees alſo. And no ſubſequent act will help in this caſe: for if one by words of bargain and ſale only, without any other words in the deed, grant a reverſion, and the deed be not inrolled, and after the tenant doth attorn; hereby nothing doth paſs, neither ſhall it enure as a confirmation. But yet this muſt be noted, that in ſome caſes, where a deed will not enure by way of bargain and ſale for ſome of the cauſes aforeſaid, it may enure to ſome other purpoſes. A bargain and ſale may be made of goods, and chattles, without any ſuch ſolemnity as before; for it may be by word as well as by writing, with or without any words of bargain and ſale, as well as by thoſe words; by a deed poll, as well as by a deed indented; and that without any inrolment at all, and without any delivery of any part of the things ſold, or of any piece of money, (as the manner is) in the name of ſeiſin. But in this caſe alſo ſome reſpect is to be had unto the cauſe and conſideration of the bargain, as well as in the caſe of the bargain and ſale of lands. For howſoever perhaps in the caſe of a grant, or bargain and ſale, of goods, or chattles, by deed in writing, the conſideration is not material. And that if a man do by his deed under his hand and ſeal, bargain and ſell timber trees, or any other thing, without any conſideration at all, the ſame may paſs well enough; yet if the contract be by word, or by writing ſealed and not delivered, if there be no conſideration or no good conſideration of it, it is of no effect at all. And therefore if a man by word of mouth ſell to me his horſe, or any other thing, and I give him or promiſe him nothing for it; this is void and will not alter the property of the thing ſold. But if one ſell me a horſe, or any other thing, for money, or any other valuable conſideration, and the ſame thing is to be delivered to me at a day certain, and by our agreement a day is ſet for the payment of the money; or all, or part of the money is paid in hand; or I give earneſt money (albeit it be but a penny) to the ſeller; or I take the thing bought by agreement into my poſſeſſion, where no money is paid, earneſt given, or day ſet for the payment; in all theſe caſes there is a good bargain and ſale of the thing to alter the * property thereof: and in the firſt caſe I may have an action for the thing, and the ſeller for his money; in the ſecond caſe I may ſue for and recover the thing bought; in the third I may ſue for the thing bought, and the ſeller for the reſidue of the money; in the fourth caſe where earneſt is given we may have reciprocal remedies one againſt another; and in the laſt caſe the ſeller may ſue for his money. If *A.* ſell cloth to *B.* for ten ſhillings, and *B.* takes away the cloth againſt the will of *A.* in this caſe *A.* ſhall have an action of treſpaſs againſt *B.* And if *A.* ſell cloth to *B.* for ten ſhillings in his election to make it a bargain or not, and if he will he may keep his cloth until the other pay him, and if *A.* ſay nothing, but doth ſuffer *B.* to take it away; he may make it a bargain if he will, and bring an action of debt for his money. If I offer money for a thing in a market or fair, and the ſeller agree to take my offer, and whilſt I am telling the money as faſt as I can, he doth ſell the thing to another; or when I have bought it, we agree that he ſhall keep it until I can go home to my houſe to fetch the money; in both theſe caſes, eſpecially in the firſt, the bargains are good, ſo as the ſeller may not ſell them afterwards to another, and upon the payment

Of goods and chattles.

Experientia.

Plow. 308.

Dier 29. 30.
14 H. 8. 19.
9 H. 7. 21.
21 H. 7. 6.
10 H. 7. 6.
Plow. 432.

* P. 225.

payment, or tender and refuſal of the money agreed upon, I may take or recover the things.

Co. 1. 87. ſuper Lit. 10. Dier 169. If one do bargain and ſell his land to me for money, to have and to hold to me generally, and doth not ſay to me and my heirs; by this I have but an eſtate for life and no more. 6. How a bargain and ſale ſhall be taken.

Dier 155. If one in conſideration of ten pounds paid by me doth bargain and ſell his land to me and my heirs, to have and to hold to me to the uſe of the bargainor for life, the remainder in tail to me, the remainder to the right heirs of the bargainor; this *Habendum* in this caſe is void, and I and my heirs ſhall have the land for ever (1). Of lands

Co. 6. 33. If one in conſideration of ten pounds ſell me land for the term of twenty years, and doth not ſay when this term ſhall begin; in this caſe it ſhall begin preſently. See more in *Expoſition of deeds, chap. 5. in toto* (2).

Kelw. 87. Plow. 140. 41. If one ſell me any thing by the tod, pound, buſhel, yard, or ell; it ſhall be accounted me aſſured, and reckoned according to the cuſtom of the country and place, and not according to the ſtatutes or the meaſures of other countries. Of goods.

Plow. 86. 27 H. 8. 27. Bro. Contract. 4. If one ſell me twenty barrels of ale, or ten pottles, or cups of wine; by theſe bargains I ſhall not have the barrels, pottles, or cups, with the ale or the wine. But if one ſell me a hogſhead, or a firkin of wine, it ſeems by this bargain I ſhall have the hogſhead and firkin with the wine.

27 Aſſ. 29. If one ſell me all his trees in ſuch a wood, and that I ſhall not cut them until *Michaelmas*, and in the interim hawks do breed in the trees; it ſeems in this caſe that the vendor ſhall have them, * and that I may not meddle with them. And yet ſee *Co.* 11. 58. which ſeems to be to the contrary. * P. 226.

Co. 4. 71. Bro. fait Inrol. 9. The inrolment of a deed of bargain and ſale, when it is done within the ſix months, ſhall to moſt purpoſes relate to the time of the delivery or of the date of the deed. And it is given as a rule, that it ſhall have relation to the time of the delivery of the deed, *viz.* to avoid all mean eſtates and charges made to a ſtranger by the bargainor after the delivery of the deed before the inrolment, but not to deveſt any eſtate lawfully ſettled in the interim in the bargainee himſelf. And therefore if one bargain and ſell his land by deed indented to one, and after, before the deed is inrolled, he enter into a ſtatute, or grant a rent-charge out of this land, or make a leaſe of the land to another, and then the deed is inrolled within the time; in this caſe the relation ſhall avoid all the mean charges and eſtates. And if *A.* bargain and ſell his land by deed indented to *B.* and afterwards doth ſell the ſame land by deed indented to *C.* and the deed made to *C.* is firſt inrolled, and then the deed made to *B.* is inrolled alſo within the ſix months; in this caſe *B.* ſhall have the land, and the relation of his inrolment ſhall make the inrolment of the other deed void (3). So 7. How and to what purpoſes a deed of bargain and ſale of lands and the inrolment thereupon ſhall relate. And how and to what purpoſes not.

Dier 218.

(1) See the caſe in *Dier*. See alſo *Aſh* v. *Gallen*, 1 *Ca. in Chan.* 114.

(2) A covenant in a bargain and ſale not inrolled is binding. 1 Ld. *Raym.* 388. Tho' after the inrolment and acknowledgement the bargainor or bargainee dies before the inrolment yet the land paſſeth, *Wood's Inſt.* 259. 2 *Inſt.* 674.

(3) Accordingly in *Wood's Inſt.* 259. if two bargains and ſales are made of the ſame lands to two ſeveral perſons, and the laſt deed is firſt inrolled, and afterwards the firſt deed is alſo inrolled within ſix months, the firſt buyer ſhall have the land: for when the deed is inrolled, the bargainee is ſeiſed of the land from the delivery of the deed, and the inrolment ſhall relate to it. See further *Mo.* 41. *Cro. Jac.* 53. 409. *Noy* 106. if a man bargains and ſells to *A.* and afterwards makes a bargain and ſale of the ſame land to *B.* and the deed to *B.* is firſt inrolled, but the deed to *A.* is not inrolled within ſix months, the bargain and ſale is good; but if the deed to *A.* had been inrolled within the ſix months, the deed to *B.* had been void. *Hob.* 165.

if *A.* levy a fine of the land to *C.* yet *B.* ſhall have the land. But if the firſt deed made to *B.* be not inrolled within the ſix months, and the deed to *C.* be inrolled within the ſix months, *contra.* Curia, M. 3. Jac. B. R.

If *A.* bargain and ſell land to *B.* and after levy a fine to *B.* of the ſame land, and after within the ſix months the deed is inrolled; in this caſe *B.* ſhall take by the fine, and not by the bargain and ſale (1). Co. 4. 71.

If one jointenant alien all his lands in *Dale* to *A.* and before the inrolment the other jointenant die, and after the deed is inrolled; in this caſe but a moiety, and not the whole land doth paſs (2). Bro. fait Inroll 9.

Bankrupt. If *A.* bargain and ſell his land to *B.* and after this *A.* doth become bankrupt, and the commiſſioners ſell the land to *C.* and after the deed is inrolled within ſix months; in this caſe *B.* and not *C.* the purchaſor ſhall have the land (3). So held 4. Car. B. R.

Ward. If *A.* bargain and ſell his land held *in capite* to *B.* in fee, and *B.* dieth before inrolment, and then the deed is inrolled; in this caſe the heir of *B.* ſhall be in ward. And ſo was it held by all the juſtices in Sir *Walter Earl's* caſe, *Paſch.* 15 *Jac. Curia Ward.* Pasch. 15. Jac. Contrarium tent. per Juſt. Berkley, Hil. 12 Car.

Dower. And yet in this the wife of the bargainee ſhall not have dower, as was held by *Anderſon* chief juſtice, and juſtice *Walmſley* 3 *Jac. Co. B.* and again in Sir *Robert Barker's* caſe, 6 *Jac.*

Rent. And if one bargain and ſell his land to *I. S.* and after this the rent incur; and then the deed is inrolled; the bargainee, and not the bargainor, ſhall have the rent. *Per curiam B. R. Hil.* 11 *Car.*

If *A.* bargain and ſell his land to *B.* in fee, and then marry *C.* and die, and *C.* is endowed, and after the deed is inrolled; in this caſe * the dower of the woman ſhall be taken away by relation, as was held in baron *Frevil's* caſe, 22 *Eliz. Co. B* (4). 22 Eliz.

* P. 227.

Releaſe. If *A.* bargain and ſell land to *B.* and *C.* in fee, and *B.* releaſe to *C.* before the inrolment; this releaſe is void: 3 Jac. Co. B.

If *A.* diſſeiſor bargain and ſell the land diſſeiſed to *B.* in fee, and the diſſeiſee doth releaſe to the bargainor, and after the deed is inrolled; in this caſe this releaſe ſhall avail *B* (5). So held in Mocket's caſe 10 El.

If *A.* bargain and ſell his land to *B.* and *B.* before inrolment doth bargain and ſell the land to *C.* the firſt deed is inrolled, and then the ſecond deed is inrolled: in this caſe the laſt bargain and ſale is void, and ſhall not be made good by relation, as was held by the court in Sir *Robert Barker's* caſe. 6 Jac.

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(1) For when the fee ſimple paſſed by the fine to the conuſee and his heirs, the inrolment of the deed afterwards could not deveſt and turn the eſtate out of himſelf which was abſolutely ſettled in him by the fine; for then, where he was *in* before in the *per*, he would be now in the *poſt.* 4 *Co.* 71. a.—Bargainee may ſuffer a recovery before inrolment, for he is a good tenant to the *præcipe*; and this is ſaid to be warranted by practiſe. 1 *Vent.* 361. *Perry* v. *Bowes. Vin. Abr.* Deeds (N.) *pl.* 5. 2 *Inſt.* 675. *Selwyn* v. *Selwyn*, 2 *Burr.* 1131.

(2) For the inrolment had relation to the making and delivery of the deed; ſo that it ſhall give nothing but that which was ſold by it at the time of the delivery of the deed. *Vin. Abr.* Deeds (K.) *pl.* 6.

(3) As to the power of the commiſſioners over the real eſtate of the bankrupt, and in what manner the ſale thereof ſhall be made by them, ſee ſtat. 13th. *Eliz. c.* 7. 21 *Jac. c.* 19. 2 *Bl. Com.* 285. *Green's* Bankrupt Laws 189.

(4) But relation in ſeveral caſes ſhall *aid acts in law*, as in caſe of *dower*, *&c.* tho' not *acts of parties*, viz. to make void acts of the parties good by relation or fiction of law. 3 *Co.* 29. a. *Co. Lit.* 150. a.

(5) If a diſſeiſor bargains and ſells land, and the *diſſeiſee releaſes to bargainee* before inrolment, it is void. *Arg. Roll. R.* 425. ſays it was ſo adjudged *Mich.* 10 *Eliz. Mocket's* caſe. But a releaſe to the *diſſeiſor* before inrolment had been good, and then the inrolment ſhould paſs the eſtate to the bargainee, and he ſhould take advantage of the releaſe. 1 *Roll. Rep.* 425. *Mich.* 14 *Jac.* in *pl.* 16. *Vin. Abr.* Deeds (Q.) *pl.* 11.

So was it held in Sir Chriſtopher Hatton's caſe.

If a leaſe be made rendring rent, on condition to re-enter for non-payment, and the leſſor bargain and ſell the reverſion by deed indented, and after the deed made the rent is in arrear, and then the deed is inrolled: in this caſe it ſhall not relate to give a re-entry for the condition broken.

So hath it been adjudged.

If *A.* bargain and ſell land to *B.* in tail, and *B.* before inrolment of the deed, doth make a leaſe according to the ſtatute of 32 *H.* 8. and after the deed is inrolled: this is a good leaſe (1).

And now we come to a gift.

(1) See more amply, as to the operation of a bargain and ſale, and of the inrolment thereof, and in what caſes and in what manner it ſhall relate, *Bac. Abr.* Bargain and Sale (E.) *Vin. Abr.* Bargain and Sale (K. to N.) Inrolment (E.) *Com. Dig.* Bargain and Sale (B. 9.)

CHAP. XI.

Of a Gift.

Gift. *Quid.*

THIS word, importing no more than the transferring of the property of a thing from one to another, is of larger extent than a feoffment, which is always applied to an immoveable thing; for this is often applied to moveable things alſo, as trees, cattle, houſhold-ſtuff, *&c.* the property whereof is and may be altered as well by gift, as by ſale or grant. And in this ſenſe a gift is ſometimes by the act of the party; as when one man doth give a thing to another. And this is, or may be, either by word or by writing (1). And ſometimes it is by act of law; as when a woman is married to a huſband, or one is made executor to another; in theſe caſes by the marriage only, or the taking of the executorſhip, the law gives all the goods of the woman to the huſband, and of the teſtator to his executor. So where one doth take my goods as a treſpaſſer, and I recover damages for them upon a ſuit in law; in this caſe the law doth give him the property of the goods, becauſe he hath paid for them. But this word gift is ſometimes taken more
* P. 228. * ſtrictly, and applied to a conveyance or paſſing of an eſtate of lands or tenements to another in tail, wherein this word *Dedi* is moſt commonly uſed (2). And then, he which doth ſo give
Donor. the land is called the donor, and he to whom it is given, the
Donee. donee. And this for the moſt part is by deed, though it may be otherwiſe. And for theſe deeds of gift, of immoveable or moveable things, ſee *deed* and *grant in toto*, wherein all the learning touching this matter is involved.

And ſo we paſs to a *Grant*.

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(1) By the civil law a gift of *goods* is not good without delivery, yet in our law it is otherwiſe. *per Coke* Ch. J. 1 *Roll. Rep.* 61.

(2) The conveyance by *gift*, *donatio*, is properly applied to the creation of an eſtate tail, as feoffment is to that of an eſtate in fee, and leaſe to that of an eſtate for life or years. It differs in nothing from a feoffment, but in the nature of the eſtate paſſing by it: for the operative words of conveyance in this caſe are *do* or *dedi*; and gifts in tail are equally imperfect without livery of ſeiſin, as feoffments in fee ſimple. And this is the only diſtinction that *Littleton* ſeems to take, when he ſays "it is to be underſtood that there is feoffor and feoffee, "donor and donee, leſſor and leſſee," *viz.* feoffor is applied to a feoffment in fee ſimple; donor to a gift in tail; and leſſor to a leaſe for life, or for years, or at will. 2 *Bl. Com.* 316. See further as to a *gift*, in 1 *Wood* 116. 659. *Br. Abr.* Done. *Vin. Abr.* Gift.

CHAP. XII.

Of a Grant.

Co. ſuper Lit. 172. 9. Fincheſley 29.

THIS word is taken largely, where any thing is granted or paſſed from one to another. And in this ſenſe it doth comprehend feoffments, bargains and ſales, gifts, leaſes, charges, and the like, for he that doth give, or ſell, doth grant alſo. And thus it is ſometimes in writing or by deed, and ſometimes it is by word without writing. But the word being taken more ſtrictly and properly, it is the grant, conveyance, or gift by writing, of ſuch an incorporeal thing as lieth in grant, and not in livery, and cannot be given or granted by word only without deed. Or it is the grant of ſuch perſons as cannot paſs any thing from them but by deed, as the King, bodies corporate, *&c.* And this albeit it may be made by other words, yet it is moſt commonly made by this word [grant] as being moſt proper to this purpoſe. Know therefore that amongſt hereditaments, ſome are ſuch as are ſaid to lie in livery, *i. e.* ſuch as whereof livery of ſeiſin may be made, as manors, houſes, lands, *&c.* And ſome are ſuch as do not lie in livery, *i. e.* whereof no livery of ſeiſin can, nor need to be made, but they paſs by the delivery of the deed without any more; and of this ſort are rents, reverſions, ſervices, advowſons in groſs, and the like, which things cannot paſs from man to man without deed, or matter of record, which is of a higher nature than a deed (1). And he that makes this grant is called the grantor, and he to whom it is made is called the grantee.

Grant. *Quid.*

Grantor Grantee.

2. *Quotuplex.*

It is taken here in the largeſt ſenſe as that which doth comprehend both. And ſo ſome grants are of the land or ſoil itſelf: and ſome are of ſome profit to be taken out of or from the ſoil, as rent, common, *&c.* And ſome are of goods and chattles: and ſome are of other things, as authorities, elections, *&c.* And they are made ſometimes by matter of record, and ſometimes by * deed or writing in the country, and ſometimes by word without either. Some grants alſo tend to charge the grantor with ſomething he was not charged with before; and ſome to paſs ſomething out of him to the grantee; and ſome tend to diſcharge the grantee of ſomething, wherewith he was charged or chargeable before, and whereof he is now hereby diſcharged (2).

* P. 229.

Co. 11. 73. Plow. 555.

3. Things neceſſarily requiſite to every good grant.

Regularly theſe things are requiſite in every good grant or gift. 1. That there be a grantor, donor, *&c.* and that he be a perſon able to grant, and not diſabled by any legal or natural

(1) On this difference between things corporeal and incorporeal, it hath been held, that there can be no diſcontinuance of things which lie in grant; and therefore if tenant in tail of a rent, advowſon, common, or remainder or reverſion expectant on a freehold, make a grant by deed or fine, or diſſeiſe the tenant of the land out of which the rent is iſſuing, whereof he is ſeiſed in tail, and make a feoffment with warranty, that theſe acts work no diſcontinuance of the intail, for nothing paſſes but during the life of the tenant in tail, which is lawful. *Co. Lit.* 327. b. 3 *Co.* 85. b. Alſo of things which may be transferred without the notoriety of livery of ſeiſin, ſuch as rents, advowſons, *&c.* which lie in grant, a man cannot by any act in *Pais* forfeit them. *Bac. Abr.* Grants.—See further, as to the nature of a *grant*, in 2 *Bl. Com.* 317. *Vin. Abr.* Grants (A. 2.)

(2) See accordingly 1 *Wood* 660. *Shep. Law of Aſſur*, 150.

impediment. 2. That there be a grantee, donee, &c. and that he be a perſon capable of the thing granted, and not diſabled to receive it. 3. That there be a thing granted, and that the thing be ſuch a thing as is grantable. 4. That it be granted in that order and manner that law requireth: as where the thing is not grantable without deed, that it be done by deed. And if it be by deed, that the deed have apt words to deſcribe and ſet forth the perſon of the grantor and grantee, and thing granted, &c. and that all neceſſary circumſtances, as ſealing, and delivery, and livery of ſeiſin, and attornment where it is needful, be obſerved, 5. That there be an agreement to, and acceptance of, the grant or thing granted by him to whom it is made: and for default in either of theſe particulars a grant may be void. *In acquirendo rerum dominio ſcilicet quod donationes non valent licet ſint inceptæ niſi ſint perfectæ.* But if grants be very ancient, and the things granted have been enjoyed according to the grant ever ſince the making of it; in this caſe the grant may be good, notwithſtanding ſome legal defect in ſome of theſe particulars. Perk. Sect. 11. Bro. Grant 89.

4. What ſhall be ſaid a good and ſufficient grant, giſt, or ſale: or not.

1. For the manner of it: and what may be granted without deed: or not: and how.

Rents, ſervices, &c.

Corporations, as Dean and Chapter, Mayor and Communalty, and ſuch like, regularly can neither grant lands, goods, or chattels, but it muſt be by deed. But the grantees of ſuch perſons, and all other common perſons, may grant or give any thing which doth lie in livery, as manors, houſes, lands, and ſuch like things, in fee ſimple, fee tail, for life, for years, or at will, by word without deed. And if a leaſe be made of any ſuch thing for life or years, with a remainder over in fee ſimple, fee tail, or for life; it is good, albeit the ſame be done by word without any deed in writing (1). Perk. Sect. 64. 4 H. 7. 17. Plow. 150. 16 H. 7. 3. Lit. Sect. 60.

Such things as are ſaid to lie in grant and not in livery, generally cannot be granted or given, had or taken, without deed; unleſs it be in ſome ſpecial caſes (2). And therefore rents and ſervices, and ſuch like things which are in groſs, and not incident to ſome other thing, may not be granted without a deed. And therefore if a rent-charge be granted unto me for years, I may not grant this rent over without deed. And if there be Lord and tenant of arable land by fealty, and the ſervice of yielding the tenth ſheaf of corn before it be ſowed; the Lord cannot grant this ſervice for * years without deed. But if a rent, or any ſervice be parcel of, or incident to, a manor, or any other thing which is grantable without deed; in this caſe, by the grant of the principal by word, this thing may paſs, as belonging thereunto without any deed. Alſo rents or ſervices may be granted upon a partition by one coparcener to another without deed (3). Co. ſuper Lit. 49. Dier 139. Perk Sect. 61, 60, 63. Bro. Grant 59. Perk. Sect. 61. Dier 174. Plow. 433. Bro. Grant 104.

* P. 230.

Reverſion or remainder.

A reverſion cannot be granted in fee ſimple, fee tail, for life, or years, without deed; unleſs it be in caſe where it is

(1) Before the ſtatute 29 *Car.* 2. *c.* 3. for prevention of frauds and perjuries.—That ſtatute has been often referred to, in the notes to this edition: and as that act paſſed ſince the third edition of the *Touchſtone* (in 1651.) the ſtudent will therefore conſider the alteration made by that ſtatute in the ſeveral parts of the *Touchſtone*, which treat of leaſes (exceeding the term of three years) grants, &c. being made by parol and without deed in writing, if the act is not partlcularly mentioned.

(2) Becauſe of things which lie in grant, no poſſeſſion can be delivered; and they are not like corporeal inheritances, which paſs by livery; and therefore he that claims them muſt ſhew a grant of them, which he cannot do without deed.

(3) Accordingly, *Co. Lit.* 169.

parcel of a manor (1). But a reverſion may be granted upon a partition by one coparcener to another without any deed. And the ſame law is of a remainder. And therefore if one make a leaſe for life or years to one, the remainder in fee ſimple, fee tail, or for life, to another without deed, howſoever this be a good remainder in the firſt creation without deed, yet this remainder cannot be granted over without deed.

Advowſon, Tithes &c.

19 H. 7. 8. 16 H. 7. 3. 19 H 8. 12. 21 H. 6. 43. A parſonage or rectory, albeit it conſiſt of nothing but tithes, and the like, beſides the church and church-yard, and it hath no houſe nor glebe belonging to it, yet may be granted without deed in fee ſimple, for life, or years: and then the tithes and offerings will paſs as incident. But the tithes alone, or a portion of tithes, oblations, mortuaries, or obventions, are not grantable by themſelves without deed. And therefore a leaſe parol of tithes, albeit it be but for years, is not good. And if the Parſon agree with one of his pariſhioners, that he ſhall have his own tithes; this is not a good grant of the tithes, neither may it be pleaded or uſed ſo; but perhaps by way of agreement a pariſhioner may retain his tithes. And if a leſſee for years of tithes will grant it over to another at will only, it cannot be done without deed, as was held by Baron *Denham*, 2 *Car.* at *Sarum* aſſiſes. And yet it is held that a Parſon may grant his tithes from year to year to him that is to pay them without any deed, but this is by way of retainer. But this grant or agreement muſt be made to and with the party himſelf that is to pay the tithe, and not with another: neither can this intereſt be aſſigned, or a ſtranger take advantage of it, as hath been agreed in the caſe of *Hawkes* and *Braſield*, *Paſch.* 3 *Jac. B. R.*

All this was agreed 36 El. B. R.

Mich. 8 Jac. Dr. Long-worth's caſe.

21 Ed. 3. 38. 11 H. 4. 3. Dier 29. 10. Co. 1. 1. An advowſon in groſs cannot be granted without deed; yea the grantee of the grantee of an advowſon is to ſhew both the deeds. But an advowſon is grantable upon a partition between coparceners without deed. And an advowſon incident to a manor, or piece of land, is grantable with the manor or land without any deed. The next avoidance to a church is not grantable without deed (2).

Plow. 150. 9 Ed. 4. 47.

Common of paſture, &c.

Perk. Sect. 61. Common of paſture, of eſtovers, turbary, fiſhing, *&c.* cannot be granted in fee ſimple, fee tail, for life, or years, unleſs it be in caſe of partition, or of appendancy as incident to ſome corporeal thing, * without deed. And therefore if a man grant by word of mouth to me common for twenty beaſts in his manor; this is not good. Neither, if it be granted to me by deed, may I grant this over to another without deed. But if a man have common of paſture appendant or appurtenant to his land; in this caſe he may grant his land with the common appendant by word only without any deed.

* P. 231.

Franchiſes, and ſuch like things.

15 H. 7. 8. Franchiſes, as fairs, markets, courts, warrens, and the like, or the profits thereof, are not grantable without deed. But it ſeems a hundred is grantable without deed; for that is *liberum tenementum*. The profits of a mill, county, ferry, corody, or the like, are not grantable without deed.

Things in action, and ſuchlike things.

6 H. 7. 9. Dier 91. 126. Doct. & Stud. 16. Things in action, as a right or title of action that doth only depend in action, and things of that nature, as rights and

(1) 2 *Roll. Abr.* 62.

(2) See accordingly in *Cro. Eliz.* 163 *Criſpe's* caſe.—*Long* and *Hemming's* caſe, 1 *Leon* 207. *Co. Lit* 332, 335. and *Whiſtler's* caſe, 10 *Co.* 63. See more amply how an advowſon ſhall be granted, in *Com. Dig.* Advowſon (C. 1.)

titles of entry to any real or perſonal thing, are not grantable at all, but by way of releaſe to the tenant of the land, *&c.* by which means it may be extinguiſhed: but this may not be neither without deed. And therefore if a man take my goods as a treſpaſſor, or I deliver him my goods to keep, and after I will give theſe goods to him; I cannot do this without deed.

An election, condition, covenant, aſſent, licence, or liberty, cannot be created and annexed to an eſtate of inheritance or freehold without deed. Dier 281.

Offices. A priviledge to hold land for life without impeachment of waſte is not grantable without deed. Offices for the moſt part are not grantable without deed. And yet ſome inferior offices, as ſtewardſhips, bailiwicks, and the like, are; for ſuch officers a Lord of a manor may retain by word without deed. Co. 9. 9.

Chattels. Moſt chattels real and perſonal may be given and granted without deed. And therefore if a man by word of mouth grant, give, or ſell me his leaſe for years (1), the wardſhip of body and land, or the wardſhip of land that he hath by reaſon of a tenure by knight's ſervice, or by grant from the King, or grant or ſell me the trees ſtanding upon his ground, the corn growing upon his land, his horſe, ſword, plate, or other houſehold ſtuff; this is a good grant or gift. But the wardſhip of the body of an heir only cannot be granted without deed. So a next preſentation cannot be granted without deed (2). Perk Sect. 57. 60. Bro. Done i. Dier 370 5 H. 7. 35. 36. Plow. 150.

What by the ſame deed. If one grant his reverſion of land to one, and by the ſame deed granteth a rent out of the ſame land to another, and delivereth the deed to both of them at one time; this is good, and ſhall enure firſt as a grant of the rent to one, and then as a grant of the reverſion to the other. Plow. 540.

If one convey land to another, and the grantee by the ſame deed doth grant a rent or common to the grantor out of the ſame land conveyed; this is as good as if it were by another deed. Dier 6.

* P. 232. By what words of grant. * *Dedi & conceſſi* be the moſt apt words for all kind of grants; yet it may be by other words, and the grant as good as by thoſe words (3).

The beſt way in grants is to grant by words in the preſent tenſe as well as in the preterperfect tenſe. But a grant by words of the preterperfect tenſe only, as by *Dedi & conceſſi* only without words of the preſent tenſe is good (4). 35 H. 6, 11.

2. In reſpect of the perſon of the grantor, &c. and the naming of him. And who may be a grantor. And how. Touching this part two things are requiſite: 1. That the grantor be a perſon able. 2. That, if the grant be by deed, he be ſufficiently deſcribed and ſet forth, either by his proper names or elſe by ſome other matter of diſtinction. Note therefore that whoſoever may be a feoffor, may be a grantor. And any, natural, politic, or corporate body, (not prohibited See Feoffment ca. 9. Numb. 4. Perk. Sect. 3.

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(1) A leaſe is not aſſignable without a writing ſigned by the parties ſince the ſtatute 29 *Car.* 2. *Queen* v. *Goddard.* 3 *Salk.* 171.

(2) See according 1 *Wood* 662. and fully as to a grant of the next preſentation. *Com. Dig.* Condition (C. 2.)

(3) The words *dedi* or *conceſſi*, may amount to a grant, a feoffment, a gift, a leaſe, a releaſe, a confirmation, a ſurrender, *&c.* and it is in the election of the party to uſe to which of theſe purpoſes he will. *Co. Lit.* 301. b.

(4) In many caſes the law creates a good grant without expreſs words; becauſe it is the deſign of the law to render all contracts binding and effectual, ſo far as the intention of the parties may be gathered from the deed; and ſuch interpretation is made ſtrongeſt againſt the grantor, becauſe he is preſumed to receive a valuable conſideration for what he parts with, 2 *Roll. Abr.* 56. *Bac. Abr.* Grants (F.) See further by what words grants may be made, or what may be ſaid to amount to a *grant*, in *Vin. Abr.* Grants (H. 7).

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by law, as Monk, Friar, woman covert, infant, and ſuch like) may be a grantor, donor, *&c.* And the grants of ſuch perſons will be good.

An alien may, and is able to grant or give any thing that he is capable to have or take by grant or gift (1). Alien.

Perk. Sect. 26. See ch. 2. Numb. 6. A perſon attainted of treaſon or felony may give or grant his land; and this is good againſt all others beſides the King, and the Lord of whom his land is held. And he may grant or give his goods to relieve himſelf in priſon; and this will be good againſt all others, and the King and Lord alſo. A perſon outlawed in a perſonal action may give or grant his goods or chattels; and the gift or grant will be good againſt all others but the King (2). Perſon attaint of outlawred.

Co. ſuper Lit. 3. Perk. Sect. 8. 20. 41. See ch. 2. Numb. 6. The Queen may without the agreement of the King make grants, gifts, *&c.* of her lands or goods (3): but another woman that hath a huſband cannot give or grant her lands or goods without her huſbands conſent, unleſs it be in ſome ſpecial caſes. And albeit ſhe do recite by the deed that ſhe is ſole and not covert, yet this will not help. And if the caſe be ſo, that by agreement between her and her huſband, there be a certain portion of her huſband's lands or goods allotted unto her to diſpoſe of, and manage at her pleaſure, yet ſhe alone without her huſband can make no good grant or gift of any part of theſe lands or goods. But if ſhe grant any thing by fine, and the huſband do not avoid it during the coverture; this grant will bind her after his death. And if ſhe make a gift or grant of her huſband's goods, it is thought this is not good until her huſband agree to it (4). Woman covert.

9 H. 7. 24. 26 H. 8. 2. Perk. Sect. 12, 13, 14. 19. 7 H. 4. 5. See cha. 2. Numb. 6. An infant cannot make any gift or grant, *&c.* that is good, but in ſpecial caſes; for if he maketh any grant or gift that taketh effect by the delivery of the deed only, as if he grant a rent-charge out of his land, or make a feoffment with a letter of attorney to give livery of ſeiſin, or give or ſell his horſe, and the buyer or donee take him himſelf; theſe are void *ab initio*. And if the grant, or gift take effect by the delivery of his own hand, as if he * make a feoffment and give livery of ſeiſin himſelf, or ſell a horſe and deliver him with his own hands; this is voidable by the infant himſelf, or others that ſhall have his right, *&c.* But if an infant grant any thing by * P. 233.

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(1) An alien may purchaſe *any thing*, but can *hold nothing* except a leaſe for years, of a houſe for convenience of merchandize; all other purchaſes (when found by inqueſt of office) being forfeited to the King. He is not capable of inheriting or tranſmitting by deſcent; but if he be made denizen, the iſſue which he hath afterwards ſhall be heir to him, *Co. Lit.* 2. 8.—The law will not give an alien the benefit of taking by act of law; as by deſcent, curteſy, dower, or guardianſhip, becauſe he cannot keep it; *& lex nihil facit fruſtra. per Hale ch. B.* 1 *Vent.* 417.—Alienation to an alien is a cauſe of forfeiture to the crown of the lands ſo alienated. 2 *Bl. Com.* 274. See more fully, as to the law reſpecting the capacity of an alien to acquire or convey property, in the notes to the 13th Edit. *Co. Lit.* 2. 8. 42. *Vin. Abr.* Alien (A.) *Com. Dig.* Alien (C).

(2) Perſons attainted of treaſon or felony are incapable of conveying, after the offences committed, provided attainder follows. *Co. Lit.* 42.—ſee more amply as to the conſequences of attainder or outlawry, with reſpect to the forfeiture of the lands of perſons attainted or outlawed, and how far and in what caſes grants made by them are effectual, *Bac. Abr.* Forfeiture (A.) Outlawry (D.) *Com. Dig.* Forfeiture (B. 1.) Utlagary (D.) *Bac.* Uſe of the Law 42. 1 *Wilſ. Rep. pt.* 2. *p.* 219. 2 *Bl. Com.* 290. *Vin. Abr.* Attainder (B). Forfeiture (P).

(3) The Queen conſort is of ability to purchaſe lands, and to convey them, to make leaſes, to grant copyholds, and to do other acts of ownerſhip, without the concurrence of her Lord; a very antient privilege and which no other married woman hath. See 1 *Bl. Com.* 218. 7th edit. and further in *Co. Lit.* 133. a.

(4) As to grants by feme coverts, ſee the references in note 2 to p. 54, and more amply in *Bac. Abr.* Grants (A. 4.) Baron and Feme (I.) *Com. Dig.* Baron and Feme (P.) (Q).

fine;

fine; this muſt be avoided during his minority, or elſe it cannot be avoided at all (1).

Dureſs. All grants that are made by dureſs, are voidable by the parties themſelves that make it or others that have their eſtates, *&c.* But if it be done by fine, it is good and unavoidable. Perk. Sect. 16.

Non ſanæ memoriæ. All gifts, grants, *&c.* made by deed in the country by thoſe that are *non ſanæ memoriæ* are good againſt themſelves, but voidable by thoſe that are their heirs, executors, or have their eſtate. But if it be by fine it is good and unavoidable. Co. 123, 124. See cap. 2. Numb. 6.

A man that is born dumb, or dumb and deaf, if he have underſtanding, may by delivery of the deed and making of ſigns make a good grant, gift, *&c.* But a man that is born deaf, dumb and blind cannot (2). Perk. Sect. 25.

Baſtard. A baſtard may give or grant as well as any other man, after he hath gotten a name by reputation. Perk. Sect. 26.

Parſon. A Parſon may grant any thing belonging to his parſonage for no longer time than for his own life, and therein likewiſe but during his reſidency, albeit he have the conſent of the patron and ordinary. See Leaſe.

Corporation. Neither the head without the members of a corporation, nor the members without the head, as Dean without the Chapter, or Chapter without the Dean, may give or grant any of the lands belonging to their corporation. Perk. Sect. 31, 32, 33.

Exècutors. One executor or adminiſtrator may give or ſell any of the goods of the deceaſed; and this is good to bind all the reſt (3). See Executors.

What grants eccleſiaſtical perſons may make of their eccleſiaſtical lands; huſbands of the lands of their wives; and tenants in tail of their lands intailed; See in *leaſe*.

Miſnaming. The name of the perſons in grants is ſet down only to diſtinguiſh perſons, and to make the perſon intended certain: and therefore howſoever it be beſt and moſt ſafe to deſcribe the perſon by his true and proper name of baptiſm, and alſo by his ſirname, and if it be a corporation by the true name whereby the corporation is made, yet miſtakes in this caſe unleſs they be very groſs, will not make void the grant. *Nihil facit error nominis cum de corpore conſtat.* And therefore if one that is a baſtard hath gotten a name by reputation in the place where he doth live, or another man hath gotten another name by common eſteem than his own right name, or is uſually called by another name than his true name in the place where he lives, in theſe caſes they may grant by this name, and the grant is good. And if a man be baptized by one name, and after be confirmed by another; ſome have ſaid he may grant by Co. 6. 63. ſuper Lit. 3. Perk. Sect. 41. Co. ſuper Lit. 3.

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(1) See before note 1. to *p.* 7. and note 2. to *p.* 54. and further with reſpect to the grants of infants, in the caſe of *Zouch* v. *Parſons*, 3 *Burr.* 1794. The firſt general queſtion in that caſe was, whether the conveyance was good and *bound the infant*; reſpecting that queſtion the Ch. J. elegantly ſays, miſerable muſt the condition of minors be, excluded from the ſociety and commerce of the world, deprived of neceſſaries, education, employment and many advantages, if they could do *no* binding acts. Great inconveniences muſt ariſe to *others*, if they were *bound* by no act. The law therefore, at the ſame time that it protects their imbecillity and indiſcretion from injury through their own imprudence, enables them to do binding acts, for their *own benefit*; and without prejudice to themſelves, for the benefit of *others*.—The court in that caſe held, that the conveyance, which was by leaſe and releaſe, *bound the infant*.

(2) See fully in the references in the notes before; and in *Bac. Abr.* Grants (A. 5).

(3) If a man appoints ſeveral executors, they are eſteemed in law but as one perſon, repreſenting the teſtator; and therefore the acts done by any one of them, which relate either to the delivery, gift, ſale, payment, poſſeſſion, or releaſe, of the teſtator's goods, are deemed the acts of all; for they have a joint and entire authority over the whole. *Godolp. Orp. Leg.* 134. 1 *Roll. Abr.* 924. *Went. Off. of Ex.* 95. See further poſt in the chapter on Teſtaments.

Perk. Sect. 39. Co. ſuper Lit. 3. Fitz. grant 67. Perk. Sect. 42.

either * of theſe names. *Sed Quere.* And if *John* at *Stile* grant by the name of *William* at *Stile*; this grant is good. *Et ſic de ſimilibus.* And theſe grants are good eſpecially, when there is ſome other addition to make it more certain; as when a Duke, Marqueſs, Earl, or Biſhop grant by their names of honour or dignity, and grant without any name, or with a falſe name of baptiſm; as when the Duke of *Suffolk* by the name of the Duke of *Suffolk* without any more words, or by the name of *William* Duke of *Suffolk*, when his name is *John*, or the Biſhop of *Norwich* grant ſo; theſe are good grants, becauſe there is but one ſuch Duke, and one ſuch Biſhop, within the kingdom. So if a Dean and Chapter, Mayor and Communalty grant by the name of their corporation without any addition of chriſtian or ſirname; it is good. And eſpecially then alſo are theſe grants good, when the true name doth appear in ſome other part of the deed. As when *John* at *Stile* reciteth by his deed that his name is *John* at *Stile*, and by the ſame deed doth grant by the name of *Thomas* at *Stile*. Or *Alice* at *Stile* reciting by her deed that ſhe is a feme covert, when in truth ſhe is ſole. But if an ordinary man grant by his ſirname only without any name of baptiſm, or by his name of baptiſm without any ſirname at all; in theſe, and ſuch like caſes, for the moſt part the grant will be void for incertainty; unleſs there be ſome other matter in the deed to help it, or ſome matter done *ex poſt facto* to ſupply it: for in ſome caſes where the thing granted doth lie in livery, ſuch a miſtake or incertainty in the grant may be holpen by the livery of ſeiſin upon the deed afterwards. And ſo alſo it is in the names of corporations; for if the variance and miſtake by omiſſion or alteration be only in ſome ſmall matter, ſo as it is literal and verbal only, the grant will not be hurt by it. But if the miſtake or omiſſion be in the ſubſtance of the name; the grant may be void by it. And therefore if *Decanus & capitulum eccleſiæ cathed' ſanctæ & individ. Trin. Caerlil.* grant by the name of *Decanus eccleſiæ cathed. ſanctæ Trin. in Caerlil. & totum capitulum eccleſiæ predict:* this is good: *Et ſic de ſimilibus:* for if the ſenſe doth ſtill remain either expreſly, or by neceſſary implication; and the deſcription be ſuch, as doth import a ſufficient and certain demonſtration of the true name of the corporation according to the foundation thereof, it ſufficeth. But if any of the ſubſtance or eſſence of the name be omitted, *contra.* And therefore if a corporation incorporate by the name of *Prepoſiti & collegii regalis coll. beatæ Mariæ de Eaton juxta Windſor* grant by the name of *Prep. & ſociorum Colleg. regalis de Eaton, &c.* leaving out *Collegium et beatæ Mariæ*; this grant is void (1).

* P. 234.

3 H. 6. 26. Perk. Sect. 38. 42.

Co. 6. 65. 10. 122. 11. 19. Dier 150. Co. 10. 124.

Co. ſuper Lit. 2. 3. Perk. Sect. 43. See in feoffment. cap 9. Numb. 4.

Touching this part three things are requiſite. 1. That the grantee be a perſon capable, *i. e.* that he be a perſon in being at the time of the grant made, and not diſabled by any legal * impediment to take by the grant. 2. That if the grant be by deed, the grantee be ſufficiently named, or at the leaſt ſet forth and diſtinguiſhed by ſome circumſtantial matter, and that he be ſo named or deſcribed as that he may be capable by that name whereby he is ſet forth. 3. That he himſelf, and not a ſtranger, do take by the ſame grant. Note therefore, that all natural and politic or corporate bodies that are not diſabled by law may be

3. In reſpect of the grantee and the naming of him. And who may be a grantee, &c. And how.

* P. 235.

(1) The words "*beatæ Mariæ*" are not mentioned in 10 *Co.* 124. to have been omitted; but the omiſſion of *thoſe words*, as well as of the word "*collegium*" is mentioned in *Dier* 150.

grantees. And all perſons that may be grantors may be grantees; and ſome others that cannot grant or give yet may take or receive. And a grant made to one, two, three, or twenty ſuch perſons is good. A grant of land, or rent in poſſeſſion, to the right heirs of *I. S. I. S.* being then living, is void; for there neither is, nor can be, any ſuch perſon *in rerum natura*; for no man can be an heir to another that is living. But ſuch a grant to one in remainder is good, if ſo be that *I. S.* die before the particular eſtate end, and before the remainder happen. So if a grant be to him or her that ſhall be the firſt child of *I. S.* and he have no child at the time of the grant, this is void. So if a grant be made to the wife or child of *I. S.* when there is none ſuch, it is void. As if a grant be to *I. S.* and to his firſt born ſon, or to *I. S.* and her that ſhall be his wife, and he hath at the time of the grant neither wife nor ſon; in theſe caſes, the grant is void as to the wife and ſon, and *I. S.* ſhall have all by the grant (1). Co. 1. 10r. Perk. Sect. 52, 54. Co. 2. 31.

Alien. An alien may be a grantee; but if any thing be granted unto him whereof he is incapable, as any eſtate of lands in fee ſimple for life, or years, he cannot hold it, but the king will have it from him. Co. ſuper Lit. 2.

Prerogative.

Perſons attaint. A perſon attainted of treaſon or felony, before or after attainder may be a grantee; but he cannot hold the thing granted; for if the King or Lord will, he may have it from him. So alſo perſons outlawed in perſonal actions may be grantees of lands, or goods; but the King will have the profits of the lands and property of the goods. Co. ſuper Lit. 2. Perk. Sect. 48.

Woman covert. A woman covert may be a grantee; but her huſband may by his diſagreement avoid the grant. And yet if he do not avoid it in his life time, the grant will be good: and he that will have the grant to be void, muſt ſhew that the huſband did diſagree to it. Perk. Sect. 43. Co. ſuper Lit. 2.

Infant. An infant may be a grantee, for this is preſumed to be for his advantage. And yet at his full age he may agree to it or avoid it, perfect it, or diſagree to it, and without any cauſe ſhewed. Perk. Sect. 4. Co. ſuper Lit. 2.

Men *non ſanæ memoriæ*. A man *non ſanæ memoriæ* may be a grantee as well as any other man, and it ſeems theſe grants cannot be afterwards avoided. But ſuch men may not be grantees of offices of truſt and ſuch like things. Co. Idem.

Baſtard. A baſtard, perſons deformed having human ſhape, lepers, and ſuch like, may be grantees of lands or goods, *&c.* as other men may be (2). Co. Idem.

Hermaphrodite. An hermaphrodite may be a grantee according to the moſt prevailing ſex. Co. Idem.

Clerk convict. Villains. * P. 236. * A clerk convict, and a man impriſoned, may be a grantee as well as any other. And ſo alſo may a villain of the King or of a common perſon; but he cannot retain the thing granted, for the King or Lord may have it from him if he will. But Co. ſuper Lit. 3. Serk Sect. 48. 51.

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(1) By the ſtat. 10. and 11th. *William* 3. *c.* 16. poſthumous children are enabled to take in remainder, in the ſame manner as if they had been born in their father's life time; although there happen to be no eſtate limited to truſtees after the deceaſe of the father, to preſerve the contingent remainder to ſuch after-born children, until they are born, or come in eſſe, to receive the ſame. See further how far the law regards and takes notice of infants *in ventre ſa mere*, 1 *Bl. Com.* (7 Edit.) 130. 2 vol. 169. *Bac. Abr.* Infancy (C.)—*Fearne on cont. rem.* 3d. Edit. 235.

(2) See further in what caſes baſtards ſhall take by grant or deviſe in *Vin. Abr.* Baſtard (P.) *Com. Dig.* Baſtard (E.) 1 *Burn's* Ecc. Law. 120. 3d. Edit.

Monks, Friars, and ſuch like perſons, cannot be grantees, for they are utterly diſabled (1).

Co. ſuper Lit. 3.

Regularly it is requiſite that the grantee be named by his names of baptiſm and ſirname, and ſo it is moſt ſafe; and ſpecial heed muſt be taken to the name of baptiſm, for that a man cannot have two or more names of baptiſm, as he may of ſirnames. And yet in ſome caſes, though the name be miſtaken, the grant is good. [a] As if a grant be to *I. S.* and *Em* his wife and her name is *Emelin*, [b] or a grant is made to *Alfred Fitzjames* by the name of *Etheldred Fitzjames*; [c] or a grant be to *Robert* Earl of *Pembroke* where his name is *Henry*; or to *George* Biſhop of *Norwich* where his name is *John*; [d] or a grant be to a Mayor and communalty, or a Dean and Chapter, and Mayor or Dean is not named by his proper name; [e] or a grant be to *I. S.* wife of *W. S.* where ſhe is ſole; all theſe, and ſuch like grants, are good; for in this caſe, the rule doth hold *utile per inutile non vitiatur*. [f] And if one be baptized by one name, and after confirmed by another; yet a grant to him by his firſt name is good. And ſo alſo ſome think of a grant to him by his ſecond name. *Sed Quere* of this. Alſo when a baſtard hath gotten the name by reputation, a grant may be made to him by that name, and it is good.

Miſnaming or not naming.

a] Bro. Noſme 9.
b] Bro. Confirmation 30.
c] Co. 6. 65. 27 E. 3. 85.
d] Co. ſuper Lit. 3.
e] Dier 119.
f] Co. ſuper Lit. 3.

9 E. 4. 43. Fitz. Grant. 23.

If a grant be made to *W.* at *Stile*, by the name of *W.* at *Gappe*; this is a good grant, notwithſtanding this miſtake.

Co. ſuper Lit. 3. Perk. Sect. 54. Bro. Grant. 65. Done 17. Dier 337. Perk. Sect. 55, 56. Bro. Don. 31. Grant 172. Done 30. Fitz. Done 1. Perk. Sect. 55. 52.

But where a grant doth intend to deſcribe the perſon of the grantee by his proper name, and doth omit or miſtake his chriſtian name or ſirname; in this caſe, for the moſt part, the grant is void, unleſs there be ſome ſpecial matter to help it, as in the caſes before. And yet if the grant do not intend to deſcribe the grantee by his known name, but by ſome other matter, there it may be good by a certain deſcription of the perſon, without either ſirname or name of baptiſm. And therefore a grant to the wife of *I. S.* or *primogenito filio*, or to the ſecond ſon, or to the youngeſt ſon, or *ſeniori puero*, or *omnibus filiis*, or *filiabus* I. S. or *omnibus liberis* I. S. or *omnibus exitibus I. S.* or to the right heirs of *I. S.* or to the next of blood of *I. S.* in theſe caſes, grants made to theſe perſons, in theſe words, are good; for the perſon is certainly enough deſcribed. And if a leaſe be made to *I. S.* for life, the remainder to him that ſhall come firſt to Paul's ſuch a day, or to him that *I. S.* ſhall name in three days; if, in theſe caſes, any one doth come to Paul's that day, or be named by *I. S.* within three days, and the particular eſtate doth ſo long continue; this is a good grant of the remainder. *Id certum eſt quod certum reddi poteſt.* But if a grant be made * in theſe words, *viz.* To four of the pariſhioners of *Dale*; or *Deo & eccleſiæ de D*; or to two of the ſons of *I. S.* and he hath many ſons; or to *I. S.* or *W. S.* in the diſjunctive; theſe, and ſuch like grants as theſe, are utterly void for incertainty.

Incertainty.

* P. 237.

(1) Papiſts, and perſons profeſſing the popiſh religion, were by ſtat. 11 and 12th. *William* 3. *c.* 4. §. 4. diſabled to purchaſe lands, rents or hereditaments; and all eſtates made to their uſe or in truſt for them were declared void.—By the ſtat. of 18 *Geo.* 3. *c.* 60. ſeveral parts of the ſtat. of 11 and 12 *Will.* 3. are repealed, and particularly ſo much thereof "as diſables perſons educated in the popiſh religion, or profeſſing the ſame, under "the circumſtances therein mentioned, to inherit or take by deſcent, deviſe or limitation, in poſſeſſion, re-"verſion or remainder, any lands, tenements, or hereditaments, within the kingdom of *England*, domi-"nion of *Wales*, and town of *Berwick upon Tweed*, and gives to the next of kin, being a proteſtant, a right "to have and enjoy ſuch lands, tenements, and hereditaments."

And

And if a gift or grant of goods be to the pariſhioners of *Dale* in theſe words; it ſeems this is good; but if a grant or gift of land be made to them by theſe words, it ſeems this is void. And ſo alſo it is of a grant of goods to the churchwardens of a pariſh; this is held to be good; but otherwiſe it is of a grant of land to them. A baſtard is capable by that name whereby he is uſually called; and therefore a grant to him by that name is good (1). And a right heir, or one that ſhall be the firſt iſſue of *J. S.* that hath no child, is capable of a remainder by that name, but of land in poſſeſſion he is not capable by that name. And a baſtard, as the reputed ſon of *I. S.* may take by a grant to *I. S.* and his iſſue. A Biſhop may take by the name of a Biſhop without any other name. But if a grant be made to the pariſhioners or inhabitants of *Dale*, or *probis hominibus de Dale*, or to the commoners of ſuch a waſte, or to the Lord and his tenants bond and free; theſe are not good grants; for albeit theſe perſons are capable, yet are they not capable by theſe names.

If there be two grantees, and one of them doth take by the deed, it is ſufficient; but if the grant be to one that is no party to the deed, and not to the grantee himſelf; in this caſe, albeit the grantee and he to whom the grant is made be capable and never ſo well deſcribed by their names, yet is the grant void; for no grant can be made but to him that is party to the deed, except it be by way of remainder. And therefore if a man make a leaſe for term of life, and after the leſſor grant to a ſtranger that the tenant for life ſhall have the land to him and his heirs; this grant is void. *Et ſic de ſimilibus.* And yet it ſeems in ſome caſes, if one of the grantees be party to the deed, that another grantee that is no party to the deed may take with him. And therefore the caſe was. *Robert* gave the reverſion of lands which *Agnes* his wife did hold for her life to *Stephan de la moor*, *Habendum poſt mortem dictæ Agnetis in liberum maritagium cum Johanna filia ejuſdem Roberti*; in this caſe it was adjudged, that albeit *Joan* were not named before the *Habendum*, yet that ſhe ſhould take in tail with her huſband.

Doct. & Stud. 94. Co. 1. 15. ſuper Lit. 231. New terms of the law, 251, 252. 5 E. 3. 17. Co. ſuper Lit. 21.

4 In reſpect of matter touching the thing granted, charged, &c.

Touching this point theſe things are requiſite. 1. That the thing whereof the grant is made be grantable, and that both in reſpect of the nature of the thing itſelf, and alſo of his eſtate that doth grant it; for in ſome caſes, albeit the thing for the quality of it be grantable, yet in reſpect of the eſtate and property that the owner hath in it, it is not grantable. 2. That if it be by deed, it be ſufficiently diſtinguiſhed and named.

* P. 238.

1. In reſpect of the nature of the thing granted: and what things are grantable over or chargeable: or not.

1. In reſpect of the nature of the thing itſelf.

Amongſt things that are grantable, ſome are grantable *de novo* * and in their firſt creation, but not tranſmiſſible nor aſſignable afterwards. And ſome are grantable at firſt in their original creation, and aſſignable over afterwards from man to man *in infinitum*.

See Fine Numb. 6. part 3.

All things that may be granted by fine, and whereof a fine may be levied, may be granted over from man to man.

See in expoſition of the terms of of Grants ſupra cap. 5. Numb. 15. Bro. Done 10.

All the things that are before obſerved to be grantable by or without deed are grantable over from man to man. And there-

(1) But a baſtard cannot be heir, for the eſtate ſhall eſcheat to the Lord. *Finch's Law.* 117. The difference between our law and the civil law, reſpecting baſtards being capable of inheriting, is explained in 1 *Bl. Com.* 247.

fore all corporeal and immoveable things that lie in livery, as manors, meſſuages, cottages, lands, meadows, paſtures, woods, and the like, are grantable in fee ſimple, for life, or years at firſt, and aſſignable over again at the pleaſure of the grantee. Alſo trees, and emblements are grantable. And a man may grant the veſture or herbage, *i. e.* the graſs of his ground and not the ground itſelf. And a man that is ſeized in fee of a houſe may give or ſell the timber, ſtone, &c. of the houſe, and the donee or grantee may take it after the death of the donor. Alſo all incorporeal things that lie in grant, as rents, ſervices and the like, are grantable over in fee ſimple, for life, or years, and therefore rents or ſervices reſerved upon any eſtate, and rents granted out of lands, are grantable over *in infinitum*. And if a man have a rent reſerved on a particular eſtate he may grant over parcel of it. But a rent or ſervice ſuſpended cannot be granted. Neither can a man grant a rent iſſuing out of a rent. If a rent be granted to me I may grant it over to a ſtranger before I be ſeiſed of it; and this grant is good. But an annuity it ſeems is not grantable over after the firſt creation of it. And yet if an annuity be granted to *I. S.* and his aſſigns *pro conſilio*; it ſeems this annuity is grantable over. Advowſons are grantable in fee ſimple, for life, or years, from man to man *in infinitum*. Alſo the preſentation to a church before the church is void, is grantable; but when the church is void, that turn is not grantable, for it is then in the nature of a thing in action. Alſo rectories, and tithes, and portions of tithes, and penſions are grantable from man to man *in infinitum* (1).

Perk. Sect. 103. Bro. Grants, 3 H. 6. 20. 9 H. 6. Perk. Sect. 91. 87. 101. Fitz. grant 145. Co. ſuper Lit. 144.

Rent, ſervices.

Stat. 32 H. 8. cap. 7 Perk. Sect. 90.

Advowſons, &c.

Reverſions and remainders.

Perk. Sect. 73. 88. 87.

Reverſions and remainders are grantable from man to man in fee ſimple, fee tail, for life or years. And if I have a tenantcy for life of three houſes; I may grant the reverſion of two of them. And if I have the reverſion of three houſes and four acres of land; I may grant the reverſion of two houſes and of two acres of land. And if tenant in tail be of an acre of land the remainder to his right heirs, he may grant over this remainder by itſelf; and yet it is ſuch a thing as the tenant in tail himſelf may bar by a common recovery. But if a grant be of land to *I. S.* for years, the remainder to the right heirs of *I. D.* and *I. D.* is living; this remainder is not grantable ſo long as *I. D.* doth live. Commons, of paſture, of turbary, of fiſhing, of eſtovers, are grantable in fee, for life, or years, from man to man *in infinitum*. And yet if a common in groſs and without number be granted to a man and * his heirs; it ſeems this is not grantable over to another man (2). But if common for a certain number of beaſts be ſo granted, it ſeems the law is otherwiſe, and that this is grantable over in caſe where the firſt grant is to the grantee only, and not the grantee and his aſſigns.

Perk. Sect. 103. Per two Judges againſt one Hil. 16 Jac. B. R.

Common.

* P. 239.

Perk. Sect. 101.

Offices.

Offices. Of this ſee more hereafter. Offices of the kingdom, as the offices of the Lord keeper, Chief Juſtices, or Chief Baron, or of other of the Juſtices or Barons, and ſuch like, are not grantable over to others, neither may they be executed by deputies. But the ſheriffs office, albeit

(1) See more amply in *Vin. Abr.* Grant F. and therein particularly as to the grant of an annuity, or of a preſentation.

(2) 2 *Roll. Abr.* 45. *contra.* a common without number in fee is grantable to another, 18 *E.* 4. 84. for the word heirs implies aſſigns.

it be not grantable over, yet may it be executed by deputy (1). Per Lord Keeper & 2 Ch. J. M. 5. Car. in cancellaria. Co. super Lit. 233. Peak. Sect. 101.

Prerogative. The reverſion of an office is not grantable by a ſubject as it is by the King, yet a ſubject may grant an office *Habendum* after the death of the preſent officer; and this is good. The inferior offices alſo that are offices of truſt, eſpecially if they concern the perſon of the grantor, howſoever they are grantable at firſt, yet are they not grantable over by the officer to any other, unleſs they be granted to them and their aſſigns, and of this ſort are the offices of ſteward, bailiff, receiver, ſewer, chamberlain, carver, and the like; neither may theſe be executed by deputy but where the grant is ſo (2).

Licences, authorities, &c. Licences, and authorities, are grantable at firſt for the lives of the parties or for years. But the grantees of them cannot aſſign them over. And therefore if power be given to me to make an award or livery of ſeiſin; I may not grant over this power to another. And if licence be granted me to walk in another man's garden, or to go through another man's ground; I may not give or grant this to another. 12 E. 7. 25. 13 H. 7. 13.

Poſſibilities. A bare poſſibility of an intereſt which is incertain is not grantable. And therefore if one have a term of years in land, and by his will deviſe it to *I. S.* for his life, and afterwards to me for the reſidue of the years; or deviſe it to *I. S.* if he live ſo long as the term ſhall laſt, and if he die before the term end, the remainder to me; in theſe caſes, ſo long as *I. S.* doth live, I cannot grant over this poſſibility. So if a leaſe be made to me and my wife for life, the remainder to the ſurvivor of us; I may not grant this remainder over to another man. But ſuch a poſſibility being coupled with ſome preſent intereſt is grantable over. And therefore if *A.* have four houſes in execution upon a ſtatute, and by courſe of time it will endure thirteen years, and after two of the houſes are eviſted by *elegit* for fifteen years; in this caſe he that hath this execution upon the ſtatute may aſſign over his intereſt in theſe two houſes, for after the execution by the *elegit* is ſatisfied, *A.* ſhall have the two houſes again until he be ſatisfied. The Lord cannot grant the wardſhip of the heir of his tenant whilſt the tenant is living (3). Co. 4. 66. 5. 24. Dier 244. Co. 10. 51. Perk. Sect. 90.

*** P. 240. Incidents.** Thoſe things that are inſeparably incident to others, are not * grantable without the thing to which they are ſo incident and belonging. And therefore a court Baron, which is evermore incident to a manor, is not grantable without the manor itſelf: common appendant to land, is not grantable without the land itſelf to which it doth belong: and common of eſtovers 1 E. 4. 10. Perk. Sect. 104. 5 H. 7. 7.

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(1) Wherever one office is incident to another, ſuch incident office is grantable by him who hath the principal office, and therefore it is held that the King's grant of the office of county clerk was void, it being inſeparably incident to the office of ſheriff 4 *Co.* 33.—In like manner, the office of chamberlain of the King's Bench is inſeparably incident to the office of marſhal; and therefore a grant of the office of marſhal, with a reſervation of the office of chamberlain, is void. *Per Holt* C. J. 2. *Salk* 439.

(2) See accordingly *Br. Abr.* Deputy, *pl.* 9.—Office of filazer is not grantable or aſſignable over becauſe 'tis an office of truſt. *Vin. Abr.* Grants (H. 1.) *pl.* 4.—See more amply who may aſſign his office. *Com. Dig.* Office (C.)—by whom offices ſhall be granted.—*Vin. Abr.* Offices (A.)—as to the grants of offices by eccleſiaſtical perſons, ſee *Bac. Abr.* Offices (D.) and 1 *Burr.* 219. the caſe of Sir *John Trelawney* v. Biſhop of *Wincheſter*, where the court were unanimouſly of opinion, that an office and fee, which exiſted before the firſt of *Eliz.* is *not* within the ſtatute of (1 *Eliz. c.* 19.) but may be granted *ſince*, preciſely in the *ſame manner*, in which it was granted *before*.

(3) See more amply as to the grant of a poſſibility *Vin. Abr.* Grant (N.) Poſſibility (B.) *Bac. Abr.* Grants (D. 3.)

appendant

appendant to a houſe, is not grantable without the houſe itſelf, to which it doth belong.

18 H. 7. 4. Co. ſuper Lit. 214. Bro. Grant 173. Perk. Sect. 88, 89.

A rent, ſervice, or other thing, whilſt it is wholly in ſuſpenſe, is not grantable. And therefore if the Lord diſſeiſe the tenant or the tenant infeoff the Lord upon condition; the Lord cannot grant over the ſeigniory during this ſuſpenſion. But if one have a rent in fee out of my land, and he purchaſe the ſame land for life or years; in this caſe, it ſeems the rent is grantable even whilſt the eſtate of the land doth continue. So if the tenant make a leaſe for years or life of the tenancy to the Lord; in this caſe, the Lord may grant the ſeigniory notwithſtanding. And yet if the tenant make a leaſe to another man for life, and the Lord grant the ſeigniory to this tenant for life in fee; in this caſe, it ſeems the grantee of the ſeigniory cannot grant it over, becauſe it was never in *eſſe*. Suſpended things.

Franchiſes, as views of frank pledge, perquiſites of courts, leets, conuſance of pleas, fairs, markets, goods of felons, waifs, eſtrays, hundreds, ferries, or paſſages, warrens, and the like, are grantable over from man to man, in fee, for life, or years, *in infinitum* (1). Franchiſes.

Co. 5. 24. 10. 48. Co ſuper Lit. 214. Dier 244. Perk. Sect. 86, 87, 85. Bro. Done 27. 24. 28. Co. 6. 50.

Things in action, and things of that nature, as cauſes of ſuit, rights and titles of entry are not grantable over to ſtrangers but in ſpecial caſes. And therefore if a man have diſſeiſed me of my land or taken away my goods; I may not grant over this land, or theſe goods, until I have ſeiſin of them again. Neither can I grant the ſuit which the law doth give to me for my relief in theſe caſes to another man. So if I make a feoffment to another man, on condition that if I do ſuch a thing, I ſhall have the land again; in this caſe I may not before or after the time of performance of the condition grant over the condition to another. But all theſe things I may releaſe to the parties themſelves, for it is a maxim in law, that every right, title or intereſt in *preſenti* or in *futuro*, by the joint act of all them that may claim any ſuch right, title or intereſt, may be barred or extinguiſhed. And in ſome caſes a grantee of a reverſion may take advantage of a condition annexed to an eſtate for life or years. If a man owe me money on an obligation, or the like; I cannot grant this debt to another; but I may grant a letter of attorney to another man to ſue for it and receive it, or I may grant the writing itſelf to another, and he may cancel it or give it to the obligor. A preſentation to a church, after the church is become void, is not grantable, for it is in the nature of a thing in action. And if a man take my goods from me, or from another man in whoſe hands they are, or I buy goods of another man and * ſuffer them in his poſſeſſion, and a ſtranger taketh them from him; it ſeems in theſe caſes, I may give the goods to the treſpaſſor, becauſe the property of them is ſtill in me (2). Things in action.

See condition. Co. ſuper 232. Perk. Sect. 86. Dier 283. Perk. Sect. 92. Fitz. Done 3. 7.

* P. 241.

Perk. Sect. 99. Plow. 379.

Truſts and confidences, which are perſonal things, for the moſt part are not grantable over to others. And hence it is Perſonal things.

(1) If the *King grants liberties to J. S.* He cannot grant them over. Nor he who has liberties in groſs by preſcription, as hundred, *&c.* cannot grant them over. *Br. Abr.* Franchiſes, *pl.* 38. *cites* 6 *E.* 2.—See further in *Vin. Abr.* Franchiſes (A. 2.) See more amply as to the nature of franchiſes and their incidents, and therein more particularly as to the privileges of a county palatine; the cinque ports; and corporations, in *Com. Dig.* Franchiſes.—2 *Bl. Com.* 37. *Wood's Inſt.* 205.

(2) As to a grant or aſſignment of choſes in action, ſee before in page 94. note 1. ſee further *Vin. Abr.* Aſſignment (B.) (D.) Grant (G.) *Bac. Abr.* Grant (D. 1).

also that offices of truſt and confidence are not grantable over but in ſome ſpecial caſes where they are granted to a man and his aſſigns; or where they are granted to a man and his heirs. And hence it is alſo that a wardſhip by reaſon of a term in ſocage, which by the law is given to the next of kin, is not grantable over to any other perſon by the guardian in ſocage.

Plow. 393.

Suſpended things.

Entire things.

Some things are ſo entire that they cannot be ſevered by grant. And therefore if a man hold three acres of land of me by twelve pence rent, and I grant the ſervices of the third acre; this is void, and he ſhall have all or none, for I cannot ſever the tenure. But if a man hold land of me by homage, fealty, eſcuage, and a certain rent; in this caſe I may grant the rent and keep the ſeigniory.

Fitz. Grant 19. 76.

Villains.

A villain is grantable for life, or years; and if the villain during the eſtate of the grantee, purchaſe land in fee, the grantee ſhall have it for ever as a perquiſite albeit he have but an eſtate for life in the villain itſelf (1).

Perk. Sect. 94.

Franchiſes.

Chattles real and perſonal.

All chattles real and perſonal, regularly are grantable from man to man *in infinitum*, as leaſes for years, be they preſent or future, wardſhips of tenants in *capite*, or by knight's ſervice, trees, oxen, horſes, plate, houſhold ſtuff, and the like. Alſo trees, graſs, and corn, growing and ſtanding upon the ground, fruit upon the trees, wool upon the ſheeps back, is grantable.

Dier 58. Plow. 142, 147. Perk. Sect. 91. Dier 305. Perk. Sect. 90.

Diſtreſs.

If a man ſell me ten load of wood in his wood to be taken by his aſſignment; or ſell me three acres of wood towards the north ſide of the wood; by this grant, in theſe words, I have ſuch an intereſt as is grantable over. If I make a leaſe by deed of a houſe to another, and therein it is agreed between us, that if the rent be not paid me by ſuch a time I ſhall enter into the houſe, and take and ſell the goods there as mine own to pay the rent; it ſeems this is a good grant of the goods, and that I may do according to the agreement. And if one that doth hold land of me, grant to me by deed indented that I ſhall diſtrain for my ſervice in all his land, this is a good grant.

Co. 5. 24. Fitz. Barre 280. Fitz. Grant 6.

Money.

A man may give or grant money, as, if I deliver one money, on condition that if he aſſure me of ſuch land, he ſhall have it, otherwiſe that he ſhall re-deliver it to me again, in this caſe, if he make the aſſurance he ſhall have the money, if not, I may have an accompt for it.

Fitz. Done 11.

Feræ naturæ.

Such things as are *feræ naturæ* as conies, hares, deer, and ſuch like, are not grantable at all (2).

Bro. Done 34.

Tithes.

A parſon of a church may grant his tithes for years, and yet they are not in him.

Perk. Sect. 90.

Deeds.

A man may give or grant his deeds, *i. e.* the parchment, paper and wax * to another at his pleaſure, and the grantee may keep or cancel them. And therefore if a man have an

* P. 242.

(1) Yet the villain may purchaſe ſome kind of inheritances in fee ſimple, which the Lord of the villain cannot have; as a common *ſans* number, a corrody, &c.—*Co. Lit.* 117. a.—For the doctrine of villenage ſee *Co. Lit.* 116. to 141.—Mr. *Hargrave's* argument in *Sommerſett's* caſe, and Mr. *Eſtwick's* conſiderations on that caſe.

(2) A man may be inveſted with a qualified, but not an abſolute property, in creatures that are *feræ naturæ*, 1. either *per induſtriam*, by reclaiming and making them tame by art, induſtry, and education; or by ſo confining them within his own power that they cannot eſcape, and uſe their natural liberty: 2. or *propter impotentiam*, on account of the inability of the animals, as when birds build in my trees, or conies breed in my ground: 3. Or *propter privilegium*, where a man has the priviledge of hunting, taking, or killing animals in excluſion of other perſons.—2 *Bl. Com.* 391.—See further as to the nature of property in *animals feræ naturæ*, and what remedy may be had againſt perſons unlawfully deſtroying or ſtealing them, in 1 *Hol.* Pleas of the Crown, 512.—1 *Hawk. Pl. c.* 94. *cap.* 33.—and *Vin. Abr. Tit. Feræ Naturæ.*

Co. ſuper Lit. 232. Trin. 38 El. B. R. 25 H. 8. 5. 1 H. 7. Dove's caſe.

obligation he may give or grant it away, and ſo ſever the debt and it. So tenant in fee ſimple may give or grant away the deeds of his land; and the executor in the firſt caſe, and the heir in the laſt caſe, hath no remedy. But a tenant in tail of land cannot give or grant any of the deeds belonging to the land intailed no more than the land itſelf.

1 H. 4. 31. Fitz Barre 179.

One may give or grant apparel, and it is ſaid if one make apparel for another, and put it upon him to uſe and wear, this is a gift or grant of the apparel itſelf. Apparel.

Perk. Sect. 90.

If one grant to another all the wool of his ſheep for ſeven years; this is a good grant. Wool.

Fitz. Grant 40.

If one being a Parſon give to another all the wool he ſhall have for tithe the next year; this is a good grant.

Bro. Done 19.

If one grant to another his horſe or his cow in the disjunctive; this is a good grant notwithſtanding this incertainty, and the donee ſhall have election and by that make the grant good (1). Incertainty.

2. In reſpect of the eſtate, property and poſſeſſion of the grantor.

Any eſtate that a man hath in fee ſimple, fee tail, for life, or years, in any lands, *&c.* or any rent, or profit apprender out of the ſame, is grantable from man to man *in infinitum*. And he that hath any ſuch eſtate of any lands may charge it with any rent or profit, to be taken out of it, as long as the eſtate of the land doth laſt. But an eſtate at will is not grantable over. And if an eſtate be made to a man and his heirs without the word aſſigns, yet he may aſſign it at his pleaſure, for aſſigns is included within heirs.

22 E. 4. 37. Perk. Sect. 91.

An *Intereſſe termini, i. e.* a leaſe for years to commence in *futuro*, is grantable before the term doth begin; whether it be a leaſe of the land itſelf, or any rent or other profit out of it.

Co. 4. 64.

The intereſt or eſtate, that a man hath by extent, is aſſignable from man to man at pleaſure.

Co. 6. S. Geo. Curſon's caſe Co. 1. Altonwood's caſe.

The reverſion upon an eſtate tail is grantable; and yet the tenant in tail in poſſeſſion, by the ſuffering of a common recovery, may bar him in reverſion of any fruit of it.

Co. 1. 147. 10. 48, 49. Lit. chap. Confirmation.

If an eſtate be made of land upon condition, as, if *A.* make a feoffment to *B.* on condition that if *A.* pay twenty pounds he ſhall have the land again; in this caſe, *A.* and *B.* together may at any time before the performance of the condition join together and grant this land, or charge it with any rent, *&c.* and this will be good; for it is a maxim in law, fee ſimple land may be charged one way or other. And in this caſe, *B.* may grant over his eſtate alone; but it will be ſubject to the condition. And if *B.* grant a rent out of the land to a ſtranger, and after the condition is performed and the feoffor enter; in this caſe he ſhall avoid the rent. But in this caſe *A.* cannot grant; for he hath nothing but a poſſibility. If one infeoff divers to the uſe of his ſon and heir upon condition, and before the time of performance of the condition the father and ſon join to grant or charge the land, this is a good grant or charge.

Co. 1. 147.

Co. ſuper Lit. 45. Co. 10. 48, 49.

If the tenant in tail, and he that that is next in remainder in fee, join in the grant of a rent charge in fee, and after the tenant in tail doth die without iſſue; in this caſe this is a good

* P. 243.

(1) See accordingly 1 *Wood* 668. 9. and further what things may be granted, *Vin. Abr.* Grants (D). *Com. Dig.* Grant (C).

grant and charge againſt him in remainder (1). And if *A.* doth bargain and ſell land to *B.* by indenture, and before inrolment they do join to grant a rent charge to *C.* by deed; in this caſe this is a good charge and grant, whether there be any inrolment or not. And ſo if donor and donee in tail grant a rent charge out of the land, and then the donee die without iſſue; in this caſe, the grant is good to bind the donor.

If land be granted to two men and to the heirs of their two bodies begotten; in this caſe, albeit they have ſeveral inheritancies after their death, yet neither of them can grant away his eſtate after his life; for they are divided only in ſuppoſition of law. Co. ſuper Lit. 182.

One coparcener of a feigniory may grant his part to a ſtranger. Perk. Sect. 73.

If two jointenants be of a plow land, and one of them doth grant to a ſtranger common of paſture for beaſts without number, to be taken in the ſame land; this is void. Perk. Sect. 103.

Jointenants. If two jointenants be of a reverſion, and one of them grant the whole, this is void for a moiety. Perk. Sect. 80.

If a man grant or charge that which is none of his, and that wherein he hath no property, it being in the grantee, or a ſtranger; the grant is void. And therefore if a man grant a rent charge out of the manor of *Dale*, or grant a reverſion of land, and in truth the grantor hath nothing in the manor of *Dale*, or in the land; in this caſe the grant is void. And albeit the grantor doth afterward purchaſe the manor, or the land, yet this will not make the grant good. But if the grant be by fine, or by indenture, there in ſome caſes it ſhall be good by way of eſtoppel. And in this caſe, albeit the party recite that it is his own, yet this will not mend the caſe. And therefore if a man recite that he hath a rent of ten pounds a year, and then grant five pounds a year parcel of it; in this caſe, if he have no ſuch rent the grant is void. Perk. Sect. 65. Dier 12, 33.

Eſtoppel.

Servant. A ſhepherd, bailiff, or parker, cannot give or grant away the goods of his maſter without authority. And yet it ſeems the ſervant of a taverner or mercer may give or grant his maſters wine or wares (2). And if a wife give or grant the goods of her huſband; this is a good gift or grant until the huſband diſagree to it, and by his agreement it is made good for ever. Bro. Done 56. 4.

Huſband and wife.

If a man have a leaſe for years of land, and make a leaſe for life of it, or charge it for longer time than the leaſe for years doth laſt; in this caſe, the grant is good for ſo long as the leaſe for years doth laſt and no longer. But if he make a leaſe for life and give livery of ſeiſin, he doth forfeit his eſtate. Plow. 524. 525.

Regularly a man cannot grant or charge that which is not in his own poſſeſſion, albeit, he have a right to it: and therefore if a man be diſſeiſed of his land, and before he hath entred into or * recovered the land, he doth grant or give the land, or his right to the land, to a ſtranger, or grant a rent charge out Co. ſuper Lit. 214. Perk. Sect. 65, 86.

* P. 244.

(1) When tenant in tail makes a grant *of the thing itſelf intailed*, this grant is not void by his death, for that the ſame may be made good, it being only voidable; otherwiſe 'tis of a *thing granted out of an entailed thing*, as of a *rent* granted out of land intailed, this grant is void by the death of the grantor tenant in tail, and the ſame can never be made good after—*Arg.* 1 *Bulſ.* 32. *Walter* v. *Bould.*

(2) See accordingly *Vin. Abr.* Grants (H. 9.) *pl.* 4.

of the land to a ſtranger; in theſe caſes, the grants are not good. And yet ſuch grants by fine may be good by way of eſtoppel. And by a releaſe alſo the right may be extinct. But if one hath a reverſion upon an eſtate for life, and he grant a rent iſſuing out of this land; in this caſe the grant is good, and the charge ſhall faſten upon the land after the eſtate of the tenant for life is ended. And if a man grant common, or rent, notwithſtanding that a ſtranger take the rent or uſe the common at the time of the grant, yet this grant is good; for a man cannot be out of poſſeſſion of theſe things but at his pleaſure. And if a leaſe for years be made to me, I may grant away my eſtate before my entry. And if the leaſe be to begin at a day to come, I may aſſign over my intereſt before the day come; for in this caſe the intereſt is in me from the time of making of the leaſe. Alſo I may give or ſell my goods that I have not in poſſeſſion; and therefore if a man take my goods out of mine or another man's poſſeſſion, I may afterwards give or grant theſe goods to him of another man, and this grant or gift is good.

Perk. Sect. 92. 98. Co. Super Lit. 46.

Eſtoppel.

Hil. 18 Jac. B. R. per. 2 Juſtices.

Perk. Sect. 92. 93. Fitz. Done 3. Bro. Done 13. Dier 90. 30. Co. 4. 62. 63. Dier 305. 20 H. 6. 22.

A leſſor cannot give or grant the trees growing on the ground of his leſſee for life, or years, without the licence of the leſſee; except they be firſt cut down by the leſſee or ſome other, for then he may. And if there be leſſee for life, and the leſſor give the trees growing on the ground, and after the leſſee for life dieth; in this caſe the donee cannot take them; for that at the time of the gift a property of them was in the leſſee. But if a tenant in fee ſimple give or grant the houſes ſtanding, or trees growing, on the ground he hath in his poſſeſſion; in this caſe, the grantee or donee may take them after the death of the grantor; and that, albeit they be not cut or taken down before his death. And yet if the tenant in tail give or grant the trees growing upon his intailed land, and the donor die before the trees be cut; in this caſe, the donee or grantee cannot cut them afterwards. Howbeit if ſuch a tenant in tail give or grant his emblements of corn growing on the ground; the donee may cut and take them after the death of the tenant in tail (1). And if the tenant in tail give or grant his trees, and die before they be cut, and afterwards, before the iſſue in tail enter into the land, the donee or grantee cut them and take them away; in this caſe, the iſſue in tail can bring no action of treſpaſs againſt the donee, or grantee, for the trees: but perhaps, if the trees be not removed off the ground, he may take them.

Perk. Sect. 59. Co. 11, 50.

Tenant for life. Trees.

Tenant in tail.

Emblements.

Dier 35. 15 H. 7.

If two coparceners be of an advowſon, and the one doth preſent, and then he doth grant the next preſentation; this is a good grant, but by this grant doth paſs the next he hath to grant, for his companion muſt have the next. So if one be ſeiſed in fee of an * advowſon, and he hath a wife, and he grant the third preſentation; this is a good grant, but it ſhall

Preſentation.

* P. 245.

(1) And where there is no grant of them, if tenant in fee, or in tail, die after ſowing the corn, and before ſeverance, his executor or adminiſtrator ſhall have the emblements as the chattles of the teſtator.—So every one, who has an uncertain intereſt, if his eſtate determines by the act of God before ſeverance of the corn, ſhall have the emblements, or they go to his executor or adminiſtrator.—*Co. Lit.* 55. b.—See fully as to the nature of emblements, and who ſhall have them,—2 *Bl. Com.* 122. 403.—*Com. Dig.* (Biens G.)—*Vin. Abr.* Emblements—(A.) 3 *Atk.* 16.—and as to a deviſe of them *poſt*, in the chapter on teſtaments.

be

be taken for the third he may grant, which is the fourth, for the wife is to have the third for her dower (1).

3. In reſpect of a former grant of the ſame thing.

If a man have granted a thing once, he cannot afterwards grant it again (2). And therefore if a man give or grant me a horſe firſt by word of mouth, and after grant him to me by deed; this ſecond grant is void; and therefore, if there be any fault in this grant in writing, it is not material. And if a man grant to me common of paſture without number in his ground, and after make the like grant to another; this ſecond grant is void as to me, albeit it be good againſt the grantor. And if one grant the next preſentation to a church after the death of the preſent incumbent, and after grant the ſame to another; or make a leaſe of land to one for ten years, and after make a leaſe of the ſame land to another for the ſame ten years; or give a horſe to one, and after give the ſame horſe to another; in all theſe caſes, the ſecond grant is void. But if the firſt grant or gift be only of part of the thing granted afterwards, or of part of the time only, the ſecond grant will be good for the overplus. And therefore if one be ſeiſed of a manor, and demiſe ten acres of the demeſne to one for ten years, and after demiſe the whole manor to another for twenty years; this is a good grant for the overplus of the manor beſides the ten acres, preſently; and for the whole manor, for the laſt ten years. So if the ſecond grant be to begin after the firſt is determined; it is good. And if the ſecond be ſuch as may be ſatisfied and not impeach the former, both ſhall ſtand good. And therefore if one that hath an advowſon, grant the next preſentation to one, and after he doth grant the next preſentation to another, and doth not ſay [after the death of the incumbent;] in this caſe the ſecond grant is good, and the grantee thereby ſhall have the ſecond avoidance after the death of the preſent incumbent (3).

Perk Sect. Dier 35. 350. Lit. Bro. Sect. 298. Perk. Sect. 102.

4. In reſpect of the naming or deſcription of the thing granted. Miſnaming or Miſ recital.

By the grant of an acre of land or of any other thing, by the name whereby it is called, the reverſion of that thing, if the grantor have no more but a reverſion, will paſs, and this miſtake will not hurt. But it is not ſo *e converſo*. [a] And yet ſome have ſaid, if one grant a thing in poſſeſſion, by the name of the reverſion of the thing, this is good to paſs the poſſeſſion. *Quod non eſt lex*. [b] For if one make a leaſe for years, and before the leſſee enter, the leſſor grant the land by the name of the reverſion or the land; this grant is void. If one make a leaſe for life of the demeſnes of a manor rendring rent, and after he doth grant the manor by the name of the manor; this is a good grant for the reverſion of the demeſnes, as well as for the reſidue of the manor. But if one grant common, by the name of the reverſion of the common, it ſeems this is not good. And yet if one have common and grant it for life, and during that * eſtate he doth grant the common by the name of *totam illam Communiam ſuam, &c.* ſome do hold this grant to be good.

Co. 4. 122. Perk. Sect. 114. 116. Co. 10. 106. 107. 11. 47. a] Plow. 190. b] Co. ſuper Lit. 46. See alſo Co. 2. in Lane's caſe. which doth ſeem to warrant this opinion alſo. Dier the grant is good in a common perſons caſe Bro. Grant.

* P. 246.

(1) Parceners ſeiſed of an advowſon may join in a preſentation: but if they cannot agree to preſent, the law doth give the firſt preſentment to the eldeſt; and this privilege ſhall deſcend to her iſſue, nay her aſſignee ſhall have it; and ſo ſhall her huſband who is tenant by the curteſy.—*Co. Lit.* 166. b. 186. b. See more amply in *Com. Dig. Eſgliſe* (H. 3.)—*Vin. Abr.* Preſentation (G. a.)

(2) A ſecond grant of the ſame thing to the ſame perſon by the ſame perſon, and reciting the former grant, muſt not be pleaded as a *grant*, but as a *confirmation*. *Plow. Com* 397.

(3) *Ut res magis valeat quam pereat*, according to the rule of conſtruction, mentioned in page 84.

Any

Co. 6. 65. 45 E. 3. 6. Bro. Grant 7. Perk. Sect. 116.

Any thing may be granted by the name whereby it is and hath been uſually called of latter times, within nine or ten years or thereabouts, albeit it be an improper name, and not the ancient name of the thing, but a name newly gotten. And ſo a manor may paſs by the name of a meſſuage or farm, or a farm or manor by the name of a meſſuage, if it be ſo uſually called and reputed (1). So the great houſes in *London* called *Exeter* and *Dorſet* houſes may be granted by thoſe names. And if a man grant that which in deed is a paſture ground, by the name of a wood; or grant that which in deed is a wood, by the name of a paſture ground; and the things are called by thoſe names; theſe are good grants of thoſe things, And if one grant by the name of a great field, that which in deed is but a little cloſe, but it is uſually called by the name of a great field; this is a good grant of this thing. So if one grant by the name of a plow land, that which in truth is but an acre of land, or grant by the name of a manor, that which is but a plow land; theſe grants are good. And ſo it ſeems it is *è converſo*. But if a man grant a houſe, or a meſſuage; by this grant an acre of land will not paſs.

14 H. 8. 1. 27 H. 6. 2.

Co. ſuper Lit. 150. Mich. 7 Jac. Curia. B. R.

By the grant of ſervices, a rent reſerved upon an eſtate tail will paſs.

If a man make a leaſe of one houſe to another for years, and the leſſee divide it and make two houſes of it, and after the leſſor doth grant the reverſion of it by the name of one houſe; this is a good grant to paſs it. And if one leaſe three houſes to three ſeveral men at ſeveral times, and they divide them into twenty nine tenements and houſholds in them all; and the firſt leſſor doth grant them by the name of three meſſuages: this is a good grant to paſs them all. But if he grant by the name of fifteen meſſuages or tenements only; it ſeems this is good for no more but for fifteen of the ſubdivided tenements (2).

Perk. Sect. 72.

If one recite that he hath a rent charge iſſuing out of black acre and white acre, and then grant the ſame rent, and in truth it doth iſſue out of black acre only; or if he do recite that it doth iſſue out of one acre when in truth it doth iſſue out of both; in both theſe caſes the grant is good, notwithſtanding theſe miſtakes.

Bro. Grant 12.

If one be patron of the church of *S. Peter*, and *Paul* in *D.* and he grant the next preſentation of the church of *S. Peter*, or of the church of *S. Paul*; theſe are void grants to paſs the preſentation.

Perk. Sect. 79.

Per Ch. Juſtice Hutton & Yelverton Co. B. Mic. 3. Car. in the caſe of Edward Crew.

If one grant a rent out of white acre by the name of a rent out of black acre; this grant is void as to charge white acre.

If one have a manor called *Steeple Lavington*, and he grant it by the name of weſt *Lavington* alias *Steeple Lavington*, it is a good grant by the [*alias*] * eſpecially if the grant ſay [lying in * P. 247.

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(1) A *manor* in reputation, but which is not in truth a manor, does not paſs by the name of a manor in a Fine or recovery; for they are grounded on original writs, which ought to be certain, and not to be taken by intendment; but otherwiſe in a *grant* or feoffment, for there the intent of the parties ſhall help it. *Noy* 7. *Johnſon* v. *Heydon.*—*Br. Abr.* Feoffment, pl. 14. ſee further 1 *Lev.* 27.

(2) If a man make a leaſe of eight tenements in *D.* by ſeveral leaſes, and then by deed recite ſeven of the leaſes, and grant the reverſion of them to *A.* with all his *lands, houſes, and edifices in D.* having no other lands *&c.* in *D.* than the eight tenements, the reverſion of the eighth tenement not recited ſhall paſs; for the other words, all his lands, *&c.* cannot otherwiſe be ſatisfied.—2 *Roll. Abr. Hagget* v. *Giles.*

Lavington] and the manor of *Steeple Lavington* doth lie in that parish, and the grantor hath no other land there.

If one grant all his lands which he hath in *D.* in this manner, [All my lands in *D.* which I had of the grant of *I. S*;] this is a good grant of all his lands in *D.* albeit he had them not of the grant of *I. S.* but of the grant of another. But if the words be [all my lands which I had by the grant of *I. S.* in *D*;] in this case the grant is not good to carry any other lands in *D*, but such as he had of the grant of *I. S.* So if one grant in this manner [all my manor of *Sale*, in *Dale*, which I had by descent] and in truth he had it not by descent but by purchase; this is a good grant of the manor. So if one grant all his lands in *Dale*, and say no more; this is a good grant to pass all his lands there. But if one grant in this manner [all my lands in *Dale* which I had by descent from my father,] and in truth I had them not by descent but by purchase, this grant is void and will not pass those lands. So if I grant in this manner [all my lands that I had by the attainder of *I. S.*] and in truth I had no land by that means; this grant is void. And if I grant after this manner [all my lands in *B.* in the tenure of *D.* which I had of the gift of *I. S.*] and in truth it doth lie in *B.* and is in the tenure of *D.* but it was not purchased of *I. S.* this is a good grant to pass the land.

Mic. 2. Jac. in Brown's case agreed.

Plow. 169. 395. And so was the opinion of Ch. Justice Popham 2 Jac. B. R.

Dier 87.

Mic. 2 Jac. Adjudged Brown's case.

If a parish lie in two counties, *viz. Berks* and *Wilts*, and one grant in this manner [all his close called *Callis* in the parish of *Hurst* in the county of *Berks*] and in truth the close doth lie in the county of *Wilts*; this is a good grant to pass the close. But if one grant in this manner [all his houses in the parish of *St. Bottolph extra Algate* late in the tenure of *R.*] and in truth he hath no houses there, but he hath some houses in *St. Bottolph extra Aldersgate*; this is a void grant. And yet if the grant be in this manner, [all that my house in the occupation of *I. S.* in *St. Andrew's* parish] whereas in truth it is in the parish of *K.* but in the occupation of *I. S.* it seems this grant is good to pass the house. But if it be thus [all that my house in *St. Andrew's* parish in *Holborn* in the occupation of *I. S.*] and in truth it is in another parish, but in his occupation; this grant is not good to pass the house.

Dier 299. Co. 3. 10.

If one grant in this manner [my manor of *Dale* which appeareth by office found to be of the value of ten pounds *per annum*] and in truth in the office it is found at twenty pounds *per annum*; this grant is good notwithstanding this misprision.

Hil. 2 Jac. B. R. per Tanfield.

If one grant in this manner [all my manor of *W.* late parcel of the possession of the Abbot of *S.* and late in the possession of *K.*] and in truth it was never in the possession of *K.* this grant is good notwithstanding. But if the grant be thus [*omnia illa terras &c.* * *in tenura* I. S. *jacen. in* W. *nuper prioratui de* S. *spectan.*] and in truth the land doth lie in *S.* and not in *W*; this is no good grant to pass the lands in *S.* And if the lands do lie in *W.* but are in the tenure of *I. D.* and not in the tenure of *I. S.* the grant is void to pass the lands in the occupation of *I. S.*

Pasc. 7 Jac. B. R. Co. 2. 32.

* P. 248.

If one purchase land of *I. S.* in *T.* and have no other land there, and he grant his land in *T.* late the land of *R. S.* or late the land of *S.* and mistake or omit the christian name;

Dier 376. Bro. Grant 92.

this grant is good, notwithſtanding this miſtake. And ſo alſo it is where there is a blank left for the chriſtian name. And if in this caſe he grant all his land in *T.* and ſay no more, this is a good grant to paſs the land. And if one grant [all his lands in *D.* called *N.* which were the lands of *I. S.*] this is a good grant to paſs the lands called *N.* though they were never the lands of *I. S.* But if the grant be [of all his lands in *D.* which were the lands of *I. S.*] by this none but thoſe lands that were the lands of *I. S.* will paſs.

Dier 80. If one grant in this manner [all my meadow in *D.* containing ten acres] whereas in truth his meadow there doth contain twenty acres, it ſeems this is a good grant for the whole twenty acres. So if one grant thus [all thoſe forty ſeven acres of land by the ſleight, whereof fifteen lie in *D.* twenty in *E.* and twenty five in *F.*] and in truth all of them do lie in *F.* and none of them in *D.* or *E.* this is a good grant to carry the whole forty ſeven acres.

Bro. Grant 69. If one grant twenty load of wood, and ſay in his grant [of which twenty load of wood he had ſixteen load by the grant of his father *I. S.*] and in truth *I. S.* did not grant any wood to him at all, or did not grant unto him ſixteen load only: this is a good grant of the twenty load of wood, notwithſtanding this falſe recital.

Bro. Grant 53. 7 H. 4. 41. If one grant his manor of *D.* and doth not ſay in what town or towns it doth lie; this is a good grant. But it is beſt to ſay in what towns the manor doth lie; for if it lie in divers places (as it may) and any of the places into which it goeth be omitted, and the reſt are ſet down; no part of the manor lying in the town that is not expreſſed will paſs.

Co. 1. 46. If one grant a manor, and that which in truth is but one manor, by the name of the manor of *A.* and *B.* this is a good grant of the manor. And ſo alſo it is if it be two manors, as if a man be ſeiſed of the manors of *Ryton* and *Condor* in the county of *Salop*, and he grant in this manner [*totum illud Manerium de Ryton & Condor cum pertinen. in Com. Salopiæ*:] this is a good grant of both the manors. Otherwiſe it is in caſe of the King. Prerogative.

Curia Co. B. Paſc. 9 Jac. Inter Plat. & Sleep. Bro. Grant 53. If one have a farm of land, meadow, *&c.* by leaſe called *Hodges*, lying within the pariſhes of *St. Stephen* and *St. Peter* in *St. Albans*; and he, reciting the ſaid leaſe, grant to *C.* his term, and intereſt in the houſe, lands, *&c.* called *Hodges* in the pariſh of *St. Peter* * and *St. Albans*; this grant is good only for ſo much as doth lie in the pariſh of *St. Peter*, and not for that which doth lie in *St. Stephens*. But if he grant the farm, and doth not ſay in what pariſh it doth lie; this is a good grant of the whole farm. As in the caſe before of a manor that doth lie in divers pariſhes. And if in the caſe here, the farm lie within the pariſh of *St. Peter* only; the grant is good for the whole farm. If one recite, that whereas he hath ſuch lands by forfeiture, or whereas ſuch a one hath an eſtate of his land, or whereas the grantee hath paid him ten pounds or done him ſuch ſervice, or the like, and theſe things are not true, and afterwards he doth grant the land by apt words; this miſtake in theſe caſes will not hurt the grant. But otherwiſe it is in caſe of the King, in ſome of theſe caſes. Prerogative.

* P. 249.

Co. 11. 50. If one have a manor in which he hath parks and fiſhponds, and he grant the manor for life, except the game and fiſh, and after

after grant the reverſion of the manor; this is a good grant of the game and fiſh alſo.

If a grant be of [*Centum libratas terræ*, or 50 *libratas terræ* or of *Centum ſolidat' terræ*] it ſeems theſe are good grants, and that hereby doth paſs land of that value, and ſo of more or leſs. Co. ſuper Lit. 5.

If a grant be of an acre of land covered with water, this is a good grant. Co. ſuper Lit. 4.

If a grant be of a certain portion of land or tithes, or of the fourth part of land or tithes, and there be a ſufficient certainty in the deſcription of it, this grant is good. And therefore if the grant be of the fourth part of the tithes, and of the offerings of the church of *St. Peter*, this is a good grant. Dier 84. 34 E. 3.

If one, ſeiſed of an advowſon in fee, grant to *I. S.* that as oft as the church is void he ſhall name the clerks to the grantor, and he ſhall preſent him to the ordinary; this is a good grant of the advowſon. Bro. Grant. 101, 121.

A reverſion may be granted by the name of a remainder, or a remainder by the name of a reverſion, and ſuch a grant is good. As if one grant land to *I. S.* the reverſion to *I. D.* this is a good grant of the remainder. Dier 46. Plow. in Hil. & Grange's caſe.

If one make a leaſe of land to huſband and wife for their lives, and after grant the reverſion of this by the name of the reverſion of the land which the wife doth hold for life; this grant is void. So if one grant to two for life, and after grant the reverſion of one of them, this is void. Fitz. Grant. 63.

A fulling, or griſt mill, may be granted by the name of a mill only. 21 Aſſ. pl. 23

Incertainty.

If one grant in this manner [all that his meſſuage, *&c.* And all the lands, meadows, and paſtures, thereunto belonging; this is a good grant, and certain enough to paſs all the lands, meadows and paſtures uſually occupied therewith. 27 H. 6. 2. Plow. 164. Bro. Leaſe 55.

* P. 250.

* If the Lord grant his manor by the name of [his manor with the reverſion of all his tenants;] or by the name of [the reverſion of all his tenants bond and free which hold for life or years;] and do not name them by their particular names; theſe grants are good in theſe caſes and certain enough. Fitz. Grant 68. Perk. Sect. 68.

If one grant land, and ſay not in what pariſh or county or village it doth lie; yet if there be any other matter to deſcribe it; it ſeems the grant is good enough, and it may be averred where it lieth. But if there be no circumſtantial matter in the grant to denote and decypher out where it doth lie; it ſeems the grant is void for incertainty (1). And therefore if one grant his manor of *Dale*; or his lands in the occupation of *I. S.* or his lands that deſcended to *I. S.* or his lands that did belong to the priory of *S.* or the like; theſe are good grants and certain enough. *Id certum eſt quod certum reddi poteſt.* Bro. Grant 53. Co. 9. 47.

If there be tenant for life of three houſes, and four acres of land, and he in reverſion grant the reverſion of two houſes and of two acres of this land; this is a good grant and hath ſufficient certainty in it. Perk. Sect. 73.

If a grant be incertain altogether, and have not ſufficient certainty in it, and cannot be made certain by ſome matter *ex* Perk. Sect. 67.

(1) So in like manner where there is any uncertainty in the limitation of the eſtate, as where *A.* poſſeſſed of lands for a term of two thouſand years, grants to *B.* and his wife, *without mentioning any term*, to the uſe of *C.* for his life and to the heirs of his body; and in default of iſſue to *B.* for one thouſand eight hundred years; the firſt limitation held to be void for uncertainty, it mentioning to grant to *B.* and *ux.* and not ſaying for what eſtate or term.—See *Kerſly* v. *Duck*, 2 *Vern.* 684.

poſt facto, it is void. And therefore if there be Lord and tenant of three acres of land by fealty and twelve pence rent, and the Lord grant [the ſervices of the third acre] to a ſtranger; this grant is meerly void. So if huſband and wife hold an acre of land jointly of *I. S.* for their lives, and *I. S.* grant the reverſion of the acre of land which the huſband alone doth hold for his life; this grant is void. So if there be Lord and three joint-tenants, and the Lord grant the ſervices of one of them to a ſtranger; this grant is void. So if one have twenty tenants that do pay him twelve pence a-piece rent, and he grant five ſhillings yearly out of theſe rents, and doth not ſay of which tenants, this grant is void for incertainty. So if conuſance of pleas be granted, and it is not ſaid before whom; this is utterly void. So if one have two tenements, and doth grant the reverſion of one of them, and doth not ſay which; this is void for incertainty. So if one grant eſtoyers to another, and ſay not what nor how; this is void. So if one grant me ſo many of his trees, or of his horſes as may be reaſonably ſpared; this grant is void (1). And yet if one grant me ſo many of his trees as *I. S.* ſhall think fit; it ſeems this grant is good. And if one grant me one hundred load of wood to be taken by the aſſignment of the grantor, or to be taken by the aſſignment of *I. S.* theſe are good grants. So if one grant me three acres of wood toward the north ſide of the wood; this is a good grant, and certain enough.

Perk. Sect. 63, 68.

9 H. 6. 12.

44 E. 3. 17. Bro. Grant 52.

Dier 91.

Co. 5. 24.

If one grant to one of the children of *I. S.* and *I. S.* hath more * than one, and he doth not deſcribe which he doth intend; this grant is void for incertainty. * P. 251.

Bro. Done 31.

If one grant to me a rent, or a robe; twenty ſhillings, or forty ſhillings; or common of paſture, or rent; in the diſjunctive, which is at firſt very incertain; yet this grant may become good, for if I make my election, or he pay the rent, or perform the grant in either part; the grant is now become good. So if one be ſeiſed of two acres of land, and he doth leaſe them for life, and grant the remainder of one of them, and doth not ſay of which, to *I. S.* in this caſe, if *I. S.* make his election which acre he will have, the grant of the remainder to him will be good. So it is when a man hath ſix horſes in his ſtable, and he doth grant me one of his horſes, but doth not ſay which of them; in this caſe, I may chooſe which I will have, and in theſe caſes when I have made my election, and not before, the grant is good. And if in theſe caſes, the grantee doth not make his election during his life, it ſeems the grant will never be good. If one be ſeized of land, and leaſe it for years rendring ten ſhillings rent, and after he doth grant a rent of ten ſhillings out of this land to a ſtranger; in this caſe, albeit there be ſome incertainty in the grant, yet this is a good grant of a rent of ten ſhillings; but it ſhall be taken a grant of a new and not of the old rent, and therefore ſhall not take effect until the particular eſtate be ended.

9 E. 4. 36. Perk. Sect. 74.

Perk. Sect. 76.

Bro. Grant 77.

See more to this point in *Deeds* and their *Expoſition, chap.* 5. *numb.* 15. and *Fine, chap.* 2. *numb.* 7 (2).

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(1) For there is no ſtandard to reduce the grant to a certainty, *Hob.* 168. *Moor* 880.

(2) And further, as to miſtakes and miſrecital in grants, in reſpect of names or things,—in *Bac. Abr.* Grants (H.)—*Vin. Abr.* Grants (D.)

5. In reſpect of matter in ſome other parts of the grant.

1. In the commencement of the eſtate.

In ſome caſes, albeit there be in a grant a good grantor, and a good grantee, and a thing granted, and all theſe are duly and certainly deſcribed, yet the grant may be void for ſome fault in ſome other thing touching the grant: as, 1. In the commencement of the eſtate. For if a man be poſſeſſed of a term of years, albeit it be one hundred years, or upwards, and grant to another all the reſidue of this term of years that ſhall be to come at the time of his death; this grant is void for incertainty. And yet if a man poſſeſſed of ſuch a term in land, grant the land to another, to have and to hold to him after the death of the grantor for fifty years, or for two hundred years; theſe are good grants; and in the firſt caſe, the grantee ſhall have fifty years, if there be ſo many to come of the term of one hundred years at the death of the grantor; and in the laſt caſe, the grantee ſhall have the land for the whole one hundred years, or ſo many of them as are to come at the death of the grantor. So if one grant any thing that doth lie in livery or in grant, and that is in *eſſe* at the time of the grant, in fee ſimple, fee tail, or for life, and the eſtate is to begin at a day to come; this for the moſt part is void: howbeit in ſome caſes the livery of ſeiſin will help it. But a leaſe for years to begin in *futuro* is good enough. And if a leaſe be made to one for years, or for years determinable upon lives, * and after a leaſe is made to another of the ſame thing, to have and to hold from the end of the former leaſe, this is a good leaſe, and the commencement certain enough. So if a leaſe be made of land to one for life, and after the reverſion thereof is granted to another for life, *cum poſt mortem vel alio modo vacare contigerit*; this is good. So if a leaſe be made to one for twenty years if he live ſo long, and after a leaſe is made to another *Habendum* after the end of the term granted to the leſſee, for twenty years to be accompted from the date of the deed laſt made, this is a good grant for twenty years after the firſt leaſe ended, and the words [to be accompted, *&c.*] ſhall be rejected. And if one grant a rent to me, *Habendum* from the time of my full age for my life, and I am of full age at the time of the grant, this grant is good for my life. If a woman ſole have a leaſe for years and take a huſband, and then he in reverſion grant the land to another, *Habendum* after the term granted to the huſband, *&c.* where in truth it was never granted to the huſband but by an act of law, *viz.* the marriage, yet this is a good leaſe. 2. In the limitation of the eſtate. For if a grant be to two & *heredibus*, without *ſuis*, this is void for incertainty. And yet a grant to one & *heredibus*, is good. And if a man grant two acres, to have and to hold the one in fee ſimple and the other in fee tail; or the one in fee ſimple and the other for life; and doth not ſet down which in fee ſimple, *&c.* in certain; yet this grant is good, and the grantee hath the election. And yet if one grant two acres to two men, *Habendum* the one to the one, and the other to the other, and ſay not which either of them ſhall have; this is void for incertainty. And if one have a reverſion of land after a leaſe for years, and grant the land *Habendum* the reverſion, or grant the reverſion *Habendum* the land, this is good.

Bro. Grant 154. Co. 1. 155. Plow. 520.

Dier 58. Co. 5. 1.

Incertainty.

Paſc. 7 Jac. Dennif's caſe.

* P. 252.

Craddock's caſe. Paſc. 7 Jac. Co. B.]

Co. 9.

Plow. 192. Co. 6. 36.

2. In the limitation of the eſtate: or in the *Habendum* of the grant.

22 H 6. 15. Plow. 28.

Perk. Sect. 75. 77. Plow. 152.

Incertainty.

Co. 10. 107. Plow. 147.

6. In reſpect of the end or ground of the grant.

In ſome caſes, a grant or gift may be void, at leaſt to ſome perſons and purpoſes when there are none of the defects aforeſaid in it; as when it is made upon a corrupt contract, or to the

end to defraud creditors of their debts, or purchaſors of their lands bought, or the like; whereof ſee before in *Deed, chap.* 4. *numb.* 5.

11 H. 7. 5. Co. ſuper Lit.

7. In reſpect of the omiſſion of ſome ceremony, &c.

And in ſome caſes, albeit there be no other fault in the grant, yet it may become void for want of ſome other matter that ought to be done, as inrolment, livery of ſeiſin, attornment, *&c.* for where theſe things are requiſite, the grant is not good until they be had, neither for that thing which will not paſs without that ceremony, nor yet for that which otherwiſe would paſs by the deed. And therefore if a feoffment be made of a manor to which an advowſon is appendant, and no livery is made, ſo that the manor doth not paſs; the advowſon will not paſs neither. Where a grant may be void by the refuſal or waiver of the grantee, ſee before in *deed, numb.* 6. *chap.* 4.

7 H. 6. 43. 21 H. 7. 23. Perk. Sect. 69. Bro. Grant. 175. Kelw. 88.

5. What ſhall be ſaid a good grant in the nature of a releaſe or diſcharge: or not.

* If one make a feoffment with warranty, and after the feoffee doth grant to the feoffor, that neither he nor his heirs ſhall vouch the warrantor or his heirs upon the warranty; this is a good diſcharge of the benefit of voucher, and doth bar the feoffee of it. And yet he may bring a *warrantia Chartæ* ſtill. So if one grant to me a rent-charge, and afterwards I grant to him that he ſhall not be ſued for this rent; this is a good grant to bar me of bringing an annuity for the rent; and yet I may diſtrain for the rent ſtill. And ſo *è converſo*, if I grant to the grantor, that he ſhall not be diſtrained for the rent; by this I am barred of a diſtreſs, but not of bringing an annuity for the rent. So if the Lord doth grant to his tenant, holding by Knight's ſervice, that his heirs ſhall not be in ward, *&c.* or a man doth grant to his debtor that he will not ſue him for the debt at all, or until ſuch a time; or one grant to his leſſee for life or years that he ſhall not be impeached for waſte; all theſe are good diſcharges, and may be pleaded by way of bar to avoid *circuity of action*.

* P. 253.

And now becauſe attornment, as hath been ſhewed, is neceſſary in ſome caſes to the perfection of ſome conveyances and grants of things that lie in grant and not in livery, we muſt therefore here ere we can go further, as a neceſſary appendix to Grants, add the learning of attornment, which followeth next in order (1).

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(1) This chapter on grants, does not particularly contain any rules for their conſtruction; it refers in ſeveral parts to the chapter on the expoſition of deeds: that chapter contains ſome general rules for the conſtruction of all parts of all kinds of deeds: and in addition thereto, it may not be altogether unacceptable to the reader to have ſubjoined ſome caſes, which ſerve to eſtabliſh the rules of conſtruction of grants in general.

Where there is ſufficient matter to guide the *intent* of the party, in ſuch manner that lay perſons may underſtand it; or ſufficient matter is contained in the deed to *ſhew the intent*; there the deed, and the words therein, ſhall be taken ſo as to make the deed good, rather than deſtroy it.—*Windham* v. *Windham.* *And.* 60.

But in conſtruing the deed according to the *intent*, the conſtruction muſt be upon the whole deed, and not one part taken, and another left out.—*Baldwin* v. *Martin.* *And.* 225.

A deed ought to be ſo expounded, that *all parts of it may ſtand together*; and it being a common aſſurance, the judges ſhall break the deed in pieces to fulfil the *intents* of the parties: *per Archer* J. *Cart.* 98. *cites* 9 *Co.* 47.

As far as it may ſtand with the rule of law, it is honourable for all Judges to judge according to the *intention* of the parties, and ſo they ought to do. *Co. Lit.* 314. b.

Ld. Ch. J. *Willes*, in delivering the opinion of the Judges in the caſe of *Smith* v. *Packhurſt*, mentions theſe two maxims, "that ſuch a conſtruction ought to be made of deeds, *ut res magis valeat quam pereat* that the end and deſign of deeds ſhould take effect" and "that ſuch a conſtruction ſhould be made of the words in a deed as is moſt agreeable to the intent of the grantor," and expreſſes himſelf in theſe remarkable words:—Theſe maxims, are founded upon the greateſt authority, *Coke*, *Plowden*, and Lord Chief Juſtice *Hale*; and the law commends the *aſtutia* the cunning of Judges, in conſtruing words in ſuch a manner as ſhall beſt *anſwer* the *intent*; the art of conſtruing words in ſuch a manner as ſhall *deſtroy* the *intent*, may ſhew the ingenuity of council, but is very ill becoming a judge. 3 *Atk.* 136.

In

In expounding a grant according to the *intent*, it muſt be done according to the *intent at the time of the grant*; as, if I grant an annuity to *I. S.* until he be promoted to a competent benefice, and at the time of the grant he was but a mean perſon, and afterwards is made an Archdeacon, yet if I offer him a competent benefice according to his eſtate at the time of the grant, the annuity doth ceaſe, *Cro. Eliz.* 35.

The law in the true conſtruction of grants hath reſpect to the *eſtate of the grantor*,—*to the ability of the grantee*; *to the conſideration which leads the eſtate*; and to the *recompence and loſs which is ſuſtained*—*per Doderidge* J.—in 3 *Bulſ.* 125, *Gough* v. *Howard.*

When there are two *clauſes* in a deed, of which *the latter* is *contradictory* to the former; there the former ſhall ſtand: per *Nicholas* J. *Hard.* 94.

An *inſenſible clauſe* doth not make the reſidue of the deed vicious, which is ſenſible of itſelf. 1 *Saund.* 320. *Pordage* v. *Cole.*

One clauſe may be explained by another. 7 *Rep.* 41. a. *Berisford's* caſe.

Clauſes in company have other conſtructions than when they are alone, *Hob.* 275, Earl of *Clanrickard's* caſe.

The law will conſtrue that part of a grant to *precede*, which ought to precede. 10 *Rep.* 28. *Sutton's Hoſpital* caſe.

No conſtruction ſhall be made contrary to the very expreſs words of the grant. *Winch.* 47, Biſhop of *Gloucester* v. *Wood.*

Quoties in verbis nulla eſt ambiguitas, ibi nulla expoſitio contra verba fienda eſt. 2 *Saund.* 167, *Lanyon* v. *Carne.* *Wing. Max.* 24.

When the words are *capable of different expoſitions*, that ſhall be taken which ſupports the declaration or agreement, and not that which defeats it. 1 *Salk.* 324. *Wyatt* v. *Aland.*

Conſtruction of words ſhall be taken according to the vulgar and uſual ſenſe and *manner of ſpeech in thoſe places, where the words are ſpoken.* 1 *Bulſ.* 175, *Hewett* v. *Painter.*

Words in grants ſhall be conſtrued according to a reaſonable and eaſy ſenſe, and *not ſtrained* to things unlikely and unuſual. *Hob.* 304. in caſe of *London* v. *The Collegiate Church of Southwell.*

Verba poſteriora, propter certitudinem addita, ad priora, quæ certitudine indigent ſunt referenda. *Wing.* 167. See the inſtances there put to ſupport this maxim.

General words do not imply any *certainty*, nor ſhall *conclude* any common perſon to ſay, that he has nothing there; and the difference between general *grants* and particular appears in *Pl. C.* 191, *Wroteſley's* caſe.

Words ſubſequent may qualify and abridge, but *not deſtroy*, the generality of the words *precedent.* 8 *Rep.* 154. b, in *Altham's* caſe.

The rule, that the *general words ſubſequent* ſhall be *reſtrained by the precedent particular words*, is good and general; eſpecially where the particular words comprehend and expreſs a thing of an *inferior nature* to the general words ſubſequent; and that the general words are put without *their dividing differences*; for there indeed the generality of them ſhall be controlled by the bounds of the particular precedent words. But where the general words do put the proper difference of particulars, and beſides *take a higher ſpecies than the particulars* mentioned before; as where the deviſe was of all his plate and jewels, and all other his eſtate real and perſonal, *&c.* there the *general words ſhall over reach the particulars before*, as if in the Archbiſhop of *Canterbury's* caſe, in 2 *Rep.* the words had been, [and all the eccleſiaſtical perſons of ſuperior or inferior rank;] they would have taken in Archbiſhops, Biſhops, *&c.* per *Holt* Ch. J. 6 *Mod.* 107. *Counteſs of Bridgwater* v. *Duke of Bolton.*

When *words* contained in a deed go to *ſeveral ſenſes* and purpoſes, the deed ſhall be taken according to the ſenſe of the words, without taking or expounding any word to be *vain* or *confounding the ſenſe* of it, as if in the deed be contained *dedi, remiſi, &c.* this may be a deed of grant, feoffment, releaſe, or confirmation, or all theſe as the caſe requires. 2 *And.* 20. *Earl of Pembroke* v. *Barkly.*

When *words of diverſe natures* are inſerted in a conveyance, the grantee has election to uſe which of them he will. 2 *Brownl.* 292, *Smallman* v. *Powis.*

Talis interpretatio ſemper fienda eſt, ut evitetur abſurdum, et inconveniens, et ne judicium ſit illuſorium.—1 Co. 52. a.—Wing. 21.

CHAP. XIII.

CHAP. XIII.

Of an Attornment.

Co. ſuper Lit. 309. Terms of the law. Plow. 25. Lit. Sect. 551.

AN attornment is the agreement of the tenant to the grant of the ſeigniory, or of a rent; or the agreement of the donee in tail, or tenant for life, or years, to a grant of a reverſion or of a remainder made to another. As where the Lord, or one that hath a rent out of land, doth grant over his ſeigniory, or his rent to another; or one that hath a reverſion or a remainder, after an eſtate for life or years, doth ſell or give the ſame away to another; in theſe caſes, the tenant of the land muſt have notice of this ſale or gift, and of the alteration of the party to whom he muſt attend in his ſervices; and he muſt give his conſent to the ſame gift or grant, or elſe generally the ſame is not good. And this yielding of conſent is called an attornment (1). And it is either actual, or verbal, or actual and verbal both. 1. *Quid.*

2. *Quotuplex.*

That which is actual, is either implied and in law, or expreſſed and in fait. Of all which there are divers examples hereafter following.

Lit. Sect. 551. Co. ſuper Lit. 302. Lit. Bro. Sect. 267. 129. 379. 39 H. 6. 24. Co. ſuper Lit. 323. 315. Lit. Sect. 608.

3. The effect of it.

* The end, effect, or fruit of this agreement is to perfect a grant, and to make a good conveyance of an eſtate; for, where this is needful, no rent nor reverſion will paſs without it; neither can the grantee of the ſeigniory, rent, or reverſion, bring any action of waſte for waſte done in the land, nor diſtrain for any rent or ſervice upon the land, before this is done. But this is only a bare aſſent, and therefore it ſhall not nor will enure, or work, to paſs any intereſt, to make a bad grant good, to enfranchiſe a villain, nor to give a man a tenancy by diſſeiſin, intruſion, or abatement, neither ſhall it work by way of eſtoppel. And therefore, if a man gain a rent iſſuing out of land by coercion of diſtreſs or otherwiſe, and the tenant of the land attorn to him; this will not amend his eſtate. But otherwiſe a grant and the attornment of the tenant do as effectually paſs the freehold and inheritance of the reverſion of land, as a feoffment and livery of ſeiſin of land do paſs the poſſeſſion of land.

* P. 254.

Lit. Sect. 579, 580. 581. Co. 6. 68. Co. ſuper Lit. 309. 314, 320.

4. Where and in what caſes the attornment of the tenant is neceſſary: or not: and how: and to what intents.

In moſt caſes, where the grantee hath means to compel the tenant to attorn, there the attornment of the tenant is at leaſt to ſome purpoſes needful; for howſoever it be true, that if a ſeigniory, rent, ſervices, reverſion, or remainder be granted by

(1) Attornment is now rendered unneceſſary by the ſtatute of 4 *Ann. c.* 16. § 9. which enacts that all grants or conveyances by fine or otherwiſe of any manors, or rents, or of reverſions or remainders, ſhall be effectual without the attornment of any of the tenants; but it is thereby provided, that no tenant ſhall be prejudiced by payment of rent to any grantor or conuſor, or by breach of any condition for nonpayment of rent, before notice ſhall be given to him of ſuch grant by the conuſee or grantee.—And by ſtatute 11 *Geo.* 2. *c.* 19. § 11. reciting, that the poſſeſſion of eſtates is rendered very precarious by the frequent and fraudulent practice of tenants, in attorning to ſtrangers, who claim title to the eſtates of their reſpective landlords or leſſors who are thereby put out of the poſſeſſion of their reſpective eſtates, and put to the difficulty and expence of recovering the ſame by action at law: it is thereby therefore enacted that all ſuch attornments ſhall be void, and the poſſeſſion not altered: but it is thereby provided that the ſaid act ſhall not extend to affect any attornment made purſuant to any judgment at law, or decree or order of a Court of Equity, or made with the privity and conſent of the landlord or landlords, leſſor or leſſors, or to any mortgagees, after the mortgage is become forfeited.

fine, in this caſe the rent, ſeigniory, &c. doth paſs; ſo as the grantee may enter for a forfeiture upon the alienation of the tenant being tenant for life, years, by ſtatute, or elegit, or upon an eſcheat of the tenant; or may ſeiſe a ward, or heriot, if it happen before any attornment be made; and if the reverſion of a leaſe for years be granted by fine, and the leſſee be ouſted and the leſſor diſſeiſed, the conuſee may have an aſſiſe; and therefore as to all theſe purpoſes the attornment of the tenant is not needful: yet the grantee, his heir, or aſſignee, cannot diſtrain the tenant for rent, or bring any action that doth lie in privity between him and the tenant, as waſte upon a waſte done by the tenant, writ of entry *ad communem legem*, or *in caſu proviſo*, or *in conſimili caſu*, upon the alienation of the tenant, eſcheat upon the dying of the tenant without heirs, or ward upon the death of the tenant his heir within age, or writ of cuſtoms and ſervices, until he have the attornment of the tenant; and therefore, as to all theſe purpoſes, the attornment of the tenant is neceſſary. And hence it is that the conuſee of a fine hath means appointed him by the law to compel the tenant to attorn: for in caſe where the Lord doth grant his ſeigniory to another, and the tenant will not attorn, the conuſee before the fine be ingroſſed may have a writ called a *Per quæ ſervitia*, and thereby compel him to attorn. And in caſe where a man doth grant a rent to another, and the tenant of the land out of which the rent doth iſſue will not attorn, the conuſee of the rent may have a writ called a *Quem redditum reddit*, and thereby compel him to attorn. And in caſe where a man doth grant a reverſion, or a remainder of his eſtate after tenant for life to another, * and the tenant will not attorn, he conuſeeof the reverſion or remainder may have a writ called a *Quid juris clamat*, and thereby compel the tenant for life to attorn. And if the conuſee of the fine die, before he have the attornment of the tenant, his heir, albeit he come to the thing deſcended by act of law, yet ſhall be in no better caſe then his anceſtor was. And if the conuſee of a fine by which he hath a reverſion granted to him, before he hath gotten the attornment of the tenant, bargain and ſell the reverſion by deed indented and inrolled; the bargainee ſhall be in no better caſe than the bargainor was. And if a reverſion be granted by fine, and the conuſee before attornment enter and make a feoffment, and the leſſee re-enter; in this caſe, the feoffee cannot diſtrain for the rent. And yet if there be Lord, meſne and tenant, and the meſne grant the ſervices of his tenant by fine to another in fee, and after the grantee die without heir, and by this means the ſervices of the meſne eſcheat; in this caſe, the Lord may diſtrain for them without any attornment of the tenant.

Per quæ ſervitia.

Old N. B. 170. Co. ſupet Lit. 252.

Quem redditum reddit.

Idem.

* P. 255.

Quid juris clamat.

Idem. Co. ſuper Lit. 310. Co. ſupet Lit. 321.

Co. 6. 68. Lit. Sect. 584, 583.

In theſe following caſes, attornment in law, or in deed, is abſolutely and to all intents neceſſary, *viz.* [a] Where one doth make a leaſe for life, or years, to one, and after doth grant the reverſion or remainder after the ſame leaſe ended, to another by deed, in fee ſimple, fee tail, for life, or years; in this caſe the leſſee for life, or years, muſt attorn. [b] So where the Lord doth grant his ſeigniory or the ſervices of his tenant by deed, in fee ſimple, or otherwiſe in fee tail, for life, or years to a ſtranger; in this caſe the tenant muſt attorn. [c] So where the Lord of a manor doth make a feoffment of his manor; in this

a] Co. 2. 68. Lit. Sect. 551. 567. 571. Co. ſuper Lit. 316.

b] Lit. Sect. 551. Co ſuper Lit. 315. Perk. Sect. 636.

c Co. 6. 68. Doct & Stud. 35. Lit. Sect. 553.

this caſe the ſervices of the tenants will not paſs without their attornment. So if another man have a rent ſervice, rent charge, or rent ſeck, iſſuing out of my land, and he doth grant this rent to a ſtranger; in this caſe I muſt attorn to this grant to the ſtranger. And if in theſe caſes the tenant doth not attorn, the grant of the reverſion, *&c.* is meerly void.

d] Co. ſuper Lit. 312. Lit. Sect. 572.

If a reverſion be granted after an eſtate of a tenant by ſtatute merchant, ſtaple, or elegit, or after an eſtate that any one hath until debts be paid, or the like; in theſe caſes, the tenants muſt attorn, or this grant will not be good.

Co. ſuper Lit. 315.

If one make a leaſe for years of land rendring rent, and after he doth grant the reverſion to another for years, to begin after the death of the grantor; in this caſe, it is needful that the leſſee for years in poſſeſſion do attorn to make this grant good. But if one make a leaſe of his land to one for ten years, and after make a leaſe of it to another, to have and to hold from the end of the ſaid term of ten years for the term of twenty years, in this caſe, it ſeems it is not needful that the firſt leſſee doth attorn, but the grant is good enough without it. If one make a leaſe to another * for twenty years, and he make a leaſe over to a third for ten years rendring a rent, and then doth grant the reverſion to a ſtranger; in this caſe, it is needful that the leſſee for ten years do attorn: but if the leaſe for ten years be made without any reſervation of rent, *contra*. For it is a rule, that where there is no tenure, attendancy, remainder, rent, or ſervice to be paid or done, there attornment is not neceſſary. And hence it is, that where one doth grant common of paſture appendant or appurtenant, or eſtovers out of land, there needs no attornment of the tenant to make this grant good. And if a rent or common be granted to one for life, and after the reverſion of it be granted to another; that in this caſe there needs no attornment to make this ſecond grant good. And if one make a leaſe to one for ten years, and then make a leaſe to another for twenty years; in this caſe the ſecond leaſe is good for the ten years to come after the firſt ten years ended, without any attornment of the firſt leſſee.

Co. 2. 35. Lit. Bro. Sect. 298. Dier 307. Co. ſuper Lit. 312. Lit. Bro. Sect. 151. 379. Bro. Attor. 59. Dier 26. Lit. Bro. 349.

* P. 256.

And ſo it was agreed in M. 37. 38 Eliz. B. R.

If a Lord exchange the ſervices of his tenant with another for land; in this caſe the attornment of the tenant, by whom the ſervice is to be done, is neceſſary to perfect this exchange.

Perk. Sect. 249, 259.

If there be Lord and tenant in fee ſimple, and the tenant doth make a leaſe to another man of the tenancy for life, and the Lord doth grant the ſeigniory to the tenant for life in fee; in this caſe the tenant in reverſion muſt attorn to the tenant for life upon this grant of the reverſion, or the grant is not good.

Lit. Sect. 562.

If I be ſeiſed of a reverſion after an eſtate for years, and I grant it to the uſe of myſelf for life, and after to the uſe of another and his heirs in fee, and after I grant my reverſion for life to another; in this caſe it is needful that the tenant for years attorn to this grant.

Hil. 8 Jac.

If a leaſe be made to *I. S.* for his life, and afterwards another leaſe is made of the ſame land to *I. D.* for his life; in this caſe, it ſeems that *I. S.* muſt attorn to this ſecond grant, or that the grant will not be good.

Dier 118.

An

An eſtate of a ſeigniory cannot be gained by a diſſeiſin, abatement, or intruſion, without an attornment. And therefore if one diſſeiſe another of a manor which is part in demeſne, and part in ſervices, the ſervices are not gained until the tenants attorn. Lit. Sect. 587.

In all caſes for the moſt part where there is no means provided by law to compel the tenant to attorn, there their attornment in law, or in deed, is not neceſſary, unleſs there be ſome ſpecial default in the grantee. *Quod remedio deſtituitur, ipſa re valet, ſi culpa abſit.* And therefore an attornment is not neceſſary in theſe caſes following, *viz.* [e] Where one doth grant a rent, reverſion, remainder, ſervice, or ſeigniory to another by way of deviſe by a laſt will and teſtament, or by Letters Patents from the King, or where ſuch * things are granted by matter of record from a ſubject to the King. So when the thing granted doth paſs by way of uſe, and doth veſt by force of the ſtatute of uſes: as if one that is ſeiſed of land in fee doth make a leaſe of it for life, or years, to *I. S.* and after levieth a fine; or doth covenant to ſtand ſeiſed of the reverſion of this land (or of the land itſelf which is all one) to the uſe of another; or doth bargain and ſell the reverſion in fee, or for years; in theſe caſes, the tenant need not to attorn: but if *A.* grant a reverſion to *B.* to the uſe of *C.* and the deed is not inrolled, or the uſe ariſe not upon conſideration of blood, *&c.* in this caſe, if the tenant doth not attorn the reverſion will not paſs. [g] If one by a common recovery ſuffered, grant a reverſion to the uſe of himſelf, his wife, or children; in this caſe, there needs no attornment of the tenant by the ſtatute of 7 *H.* 8. *cap.* 4. So where one doth come to any ſuch thing by title or ſeigniory paramount, as by eſcheat, ſurrender, or forfeiture, or by deſcent; in all theſe caſes, and the reſt before, the attornment of the tenant is to no purpoſe, neither to paſs the thing as to the eſtate, nor to make a privity to diſtrain or bring action of debt. And therefore if there be Lord, meſne, and tenant, and the meſne grant the ſervices of his tenant by fine to another in fee, and after the grantee dieth without heir; in this caſe the ſervices of the meſnalty ſhall come to the Lord paramount and he may diſtrain for them, or bring any action that lieth in privity for them without any attornment. So if leſſee for life of a manor ſurrender his eſtate to the leſſor; there needs no attornment of the tenants of the manor to make this eſtate to paſs. So if the reverſion of a tenant for life be granted to another in fee, and the grantee die without heir, ſo that the reverſion doth eſcheat; in this caſe, the Lord may diſtrain, or bring any action of waſte, *&c.* without any attornment. So if a reverſion deſcend to an heir from his anceſtor; in this caſe, it will veſt in the heir without attornment, and attornment in this caſe is not neceſſary. So if the conuſee of a ſtatute merchant extend a ſeigniory, or rent, for debt; the ſeigniory or rent ſhall be veſted in him without any attornment of the tenant.

* P. 257.

[e] F. N. B. 121. M.

Co. 6, 68. ſuper Lit. 321. 2. 35.

Agreed in the court of Wards. Hil. 18 Jac.

Calvin's caſe. Paſch. 7 Jac. B. R.

Lit. Sect. 583. 5 H. 7. 18. 19. Co. ſuper Lit. 321.

Co. ſuper Lit. 321.

If a copyholder in fee make a leaſe for years, by licence of the Lord, rendring rent, and after ſurrender the reverſion to the uſe of *I. S.* in this caſe, it ſeems an attornment of the tenant is not needful, and *I. S.* ſhall have the rent without any attornment.

Per three Juſtices Trin. 4 Jac. B. R.

If

Curia M. 37 & 38 Eliz. B. R. Co. 2. 35. ſuper Lit. 311.

If one grant the reverſion of copyhold lands for life, or years; or grant the ſeigniory of copyhold lands of inheritance; in theſe caſes there needs no attornment of the tenants to make the grants good. And ſo alſo is the law for an eſtate at will by the common law.

Lit. Sect. 578.

* If a leaſe be made to one for life, the remainder to another in tail, the remainder over to the right heirs of the tenant for life, and the tenant for life doth grant his remainder in fee; in this caſe, there needs no attornment of the tenant in tail, but the remainder will paſs by the deed preſently without any attornment at all. * P. 258.

Lit Sect. 575.

If one leaſe for life, the remainder for life, and after the leſſor releaſe all his right in the land to him in remainder for life; in this caſe there needs no attornment of the leſſee for life, to perfect this releaſe.

Lit. Sect. 574.

If two or more joint-tenants, make a leaſe for life, rendring rent, and one of them doth releaſe the rent to the other; in this caſe, there needs no attornment to make the rent to paſs.

Agreed in Curnock's caſe. M. 3 Jac. Co. B.

In all caſes where the grant is in the perſonalty, there needs no attornment. And therefore in grants of annuities, which do charge the perſon of the grantor only, and not his land, there needs no attornment. And in all caſes where there is an attornment in law, there needs no attornment in deed.

Lit. Sect. 555.

If there be Lord, meſne, and tenant, and the Lord grant the fee of the ſeigniory; in this caſe, the meſne, and not the tenant, muſt attorn.

5. By whom an attornment may and muſt be made: or not.

Co. ſuper Lit. 319.

If one make a leaſe for life, and then grant the reverſion for life, and the leſſee attorn, and after the Lord grant the ſeigniory; in this caſe it ſeems the grantee, and not the firſt leſſee for life, muſt attorn.

Lit. Sect. 554. 556. Co. ſuper Lit. 311.

If there be Lord and tenant, and the tenant make a gift in tail, or leaſe for life, of the land, and after the Lord grant the ſervices to a ſtranger; in this caſe, the tenant for himſelf, and not the tenant in tail, or for life, muſt attorn: for it is a maxim in law, that no man ſhall attorn to any grant of any ſeigniory, rent, ſervice, reverſion, or remainder, but he that is immediately privy to the grantor. But to the grant of a rent-ſeck, or rent charge, iſſuing out of ſuch land as before, the under-tenant in tail, or for life, and not the immediate tenant himſelf, muſt attorn.

Lit. Sect. 556.

If there be tenant for life, the remainder in fee, and the Lord grant the ſervices to a ſtranger; in this caſe, the tenant for life, and not him in remainder, muſt attorn.

Idem.

If there be tenant for life, the remainder in tail, and he in the reverſion after their eſtates doth grant his reverſion to a ſtranger; in this caſe, if either of them need to attorn, it muſt be the tenant for life.

Co. ſuper Lit. 312. Lit. Sect. 558.

If a woman that hath a huſband be to attorn, the huſband may and muſt do it for her; and the attornment of the huſband for the wife, whether it be expreſſed or implied, will bind the wife. Huſband and wife.

Lit. Sect. 571. Co. ſuper Lit. 316. 317.

* If one make a leaſe for years of land, the remainder for life, and after the leſſor doth grant the reverſion; in this caſe, the tenant for life or years either of them may attorn. * P. 259.

Co. ſuper Lit. 312.

If a rent charge be iſſuing out of land, and the tenant be diſſeiſed of the land; in this caſe, the diſſeiſor muſt attorn to a grantee of the land. But in caſe of the grant of a rent ſervice,

the diſſeiſee may attorn if he will, for the privity is between the Lord and the diſſeiſee only.

If a man make a leaſe for life to *I. S.* of land, and after grant a rent charge out of it to *I. D.* and after he grant over this rent to another; in this caſe, the leſſor, and not *I. S.* muſt attorn. Ibid.

The tenant in dower after ſhe hath aſſigned over her eſtate, and not the aſſignee, muſt attorn to the grant of the reverſion. And yet ſome hold that the aſſignee alſo may attorn. The ſame law is alſo of the tenant by the courteſy: but it is not ſo in other caſes; for if the reverſion of leſſee for life be granted, and leſſee for life aſſign over his eſtate, the aſſignee, and not the leſſee, muſt attorn. Co. ſuper Lit. 316. 8 E. 4. 10.

If leſſee for life aſſign over his eſtate upon condition, and then the reverſion is granted; in this caſe, the aſſignee, and not the leſſee for life, muſt attorn. Co. ſuper Lit. 315.

If a tenant in fee ſimple, that ought to attorn to a grant of a ſeigniory or rent, die before he make an attornment, his heir muſt attorn, and an attornment made by him is good. So if he grant away his land before he make his attornment, his grantee may attorn, and an attornment made by him will be good enough. Co. ſuper Lit. 315. Perk. Sect. 231.

If a Lord of a manor make a leaſe of his manor for life or years, and the freeholders and others do attorn to the leſſee, and after he grant away the reverſion of the manor to a ſtranger; in this caſe, the leſſee for life, or years, muſt attorn, and this will bind all the freeholders. Co. ſuper Lit. 311.

If there be Lord and tenant by homage, fealty and rent, and the tenant is diſſeiſed, and then the Lord granteth the rent to another; in this caſe, the diſſeiſor, and not the diſſeiſee, muſt attorn; but if he grant the whole ſeigniory, the diſſeiſee may attorn. Ibid.

Infant. A voluntary attornment, where it is needful, may be made by an infant, or one that is deaf and dumb (who may do it by ſigns). But one that is *non compos mentis* cannot make an attornment. Co. ſuper Lit. 315.

Non compos mentis.

6. To whom an attornment may and muſt be made: or not.

The attornment muſt always be made to the grantee of the reverſion, rent, *&c.* according to the grant; whether the attornment be expreſs or implied. But if divers do take by the grant, the attornment may be made to one of them, and this ſhall avail the reſt; as if a reverſion or a rent be granted to two or more, and the tenant attorn to one of them, this is good to veſt and ſettle the thing * granted in them all according to the grant. And if a leaſe be made by deed of a reverſion to *A.* for life, the remainder in fee to *B.* and the tenant attorn to *A.* this is a good attornment to ſettle the remainder in *B.* But if the tenant attorn to *B.* during the life of *A.* this is not good for *A.* howbeit, if the tenant for life die before the attornment be made; in this caſe, the attornment may be made, and this ſhall be ſufficient to perfect the grant of the remainder to *B.* Co. ſuper Lit. 310. 312.

* P. 260.

If I grant a reverſion to one man, and before the attornment of the tenant had to perfect the grant, he doth ſell this reverſion to a third man; in this caſe, the tenant may attorn to the ſecond grantee, and this will make the grant good to him. But if the attornment be made to both the grantees, it is void for incertainty. Co. 6. 68. 11 H. 7. 12.

Co. ſuper Lit. 310. Harding's caſe.

An attornment may as well be made to *ceſtuy que uſe* of a reverſion, as to the grantee of the reverſion himſelf. And it ſeems it muſt be made to him, and not to the grantee of the reverſion. For it was agreed in the court of wards, *Hil.* 18 *Jac.* That if a reverſion be granted to *B.* to the uſe of *C.* that the attornment muſt be made to *C.* and not to *B.* who is but an inſtrument.

Co. 1. 151. ſuper Lit. 310. Lit. Sect. 551. Perk. Sect. 263, 231. Co. ſuper Lit. 315. 2. 35.

7. When and at what time the attornment muſt be made.

In all caſes regularly where attornment is neceſſary, it muſt be made in the life time of the parties grantor and grantee, or exchangor or exchangee; for if either of them die before the attornment be made, the grant or exchange is void. And therefore if a manor be granted, and livery of ſeiſin be given upon the demeſnes thereof, and one of the tenants die before attornment be made by him, his tenement will not paſs, and the grant as to that part will be void; for in this caſe all the tenants, but tenant at will, muſt attorn. And albeit the grant of the reverſion be to begin at a day to come, and after the death of either of the parties, yet muſt the attornment be made in the life-time of the parties, or otherwiſe the grant will not be good. And yet an attornment may be made after the death of the tenant, by his heir; and after the conveyance of the tenant, by his aſſignee.

Co. 2. 35.

If a leaſe be made of a reverſion to begin at a day to come; in this caſe the attornment may be made before or after the day, ſo it be made in the life time of the parties.

Co. ſuper Lit. 310.

If one grant his reverſion of white acre or black acre, and the tenant attorn to the grant, before the grantee have made his election which acre he will have, this is a good attornment.

Co. ſuper Lit. 309. 310. 8. 82. 4. 61. Kelw. 163.

If a man grant his reverſion by deed to one, and after, and before the tenant do attorn, he levy a fine or make a feoffment of the land to another; in this caſe it ſeems the attornment after comes too late; but if the fine or feoffement be * but of part of the land granted before in reverſion; in this caſe the firſt grant after attornment ſhall be good for the reſidue. And if a woman ſole grant a reverſion, and after, and before attornment, ſhe marry with a ſtranger, and after the tenant attorn; in this caſe the attornment comes too late, for the marriage is a countermand of it. And if a reverſion of an eſtate for life or years be granted, and the grantor before attornment doth confirm the eſtate of the tenant for life or years, and ſo change the eſtate, and after the tenant attorn, in this caſe the attornment comes too late.

* P. 261.

Co. ſuper Lit. 309. 310. 315. Lit. Sect. 551. Plow. 344.

8. The manner of making an attornment: and what ſhall be ſaid a good attornment: or not.

To the making of a good attornment where it is needful, divers things are reqired. 1. It muſt be made by the perſon that ought to make it. 2. It muſt be made to the perſon that ought to take it. 3. It muſt be made in time convenient. 4. If it be an expreſs attornment, the tenant muſt firſt have notice of the grant of the reverſion, rent *&c.* to which he muſt attorn; but otherwiſe it is of an attornment in law, for there notice in all caſes is not neceſſary. 5. And it muſt be done in that manner the law doth preſcribe. And for this, it is to be known that it may be made by words, or by deeds, and without any writing, or by deed or writing (and this is the ſafeſt way to do it.) And any words, written or ſpoken by the tenant, that do import an aſſent and agreement to the grant of the reverſion, rent, *&c.* in ſuch manner as the ſame is made

Notice.

made after notice given to him of the grant, whether it be in the preſence or the abſence of the grantee of the reverſion, rent, *&c.* will make a good attornment in deed. And therefore, if the tenant after knowledge of the grant, uſe theſe words following, or any others to the like effect, to the grantee, *viz.* I do attorn, or turn tenant, to you according to the grant; or, I become your tenant; or, I agree to the grant; or, I am well content with the grant; or, God ſend you joy of it; theſe are good expreſs attornments. And if the tenant, after knowledge of the grant, pay, do, or deliver, all, or any part of the rent, or ſervice, before, or at the time when the ſame is due, to the grantee, or give a penny, or farthing, an ox, or a knife, or any ſuch like thing, or any other valuable thing, in the name of attornment, or in the name of ſeiſin of the rent; this is a good expreſs attornment; and that attornment, which is made by words, and deed or ſign both, is the beſt; for that doth leave a more deep impreſſion in the mind of the witneſſes. But if one have a rent charge iſſuing out of my land, and he grant it to a ſtranger; and I give him an ox to put him in poſſeſſion of the rent; it ſeems this is no good attornment.

Lit. Sect. 563. 551. 513. Co. ſuper Lit. 315. 49 E. 3. 15.

If a man grant his reverſion of my living to *I. S.* and his bailiff, that doth uſe to gather his rents, ſaith to me, that *I. S.* hath bought it, and I muſt hereafter pay my rent to him, and I tell him I am glad of it; this is a good attornment. And that, albeit it be in the * abſence of *I. S.* And it is not material whether the ſtranger know of the grant, or not, ſo the tenant know of it. And an attornment made to the Lord's Steward in the court, in the abſence of the Lord, is a good attornment. For it is ſufficient, if the tenant have notice, that he attorn to the grant in the preſence of any whomſoever. Tenant for life was, the remainder in tail, he in the remainder granted his remainder, the tenant for life, having notice of the grant, ſaith to a ſtranger in his abſence, that is the party, I am well pleaſed that the grant is made to him; it was adjudged to be good.

M. 2 Car. in the court of Wards. Co. ſuper Lit. 310. Curia B. R. Hil. 11 Car. B. R. Hilton's caſe.

* P. 262.

If a reverſion be granted to one for life, and after the ſame reverſion be granted to him for years, and the tenant attorn to both the grants at once; this attornment is void for incertainty. So if one grant his ſeigniory to *I. S.* Biſhop of *London* and his heirs, by one deed, and grant the ſame to *I. S.* Biſhop of *London* and his ſucceſſors, by another deed, and the tenant attorn to both grants at once; this attornment is void for incertainty. So if a reverſion be granted to two ſeveral perſons by ſeveral deeds, and the tenant attorn to both the grants at one time; this attornment is void for incertainty; and neither of the grants are perfected by the attornment in theſe caſes. The implied attornment, which alſo doth amount to an expreſs attornment, is made divers manner of ways. For if the tenant, after notice of the grant of the reverſion, pay his rent to the grantee, or ſurrender his eſtate to the grantee, or pray in aid of the grantee, or accept a grant of the reverſion or remainder from him that hath it, this is a good attornment in law. But if the tenant, after the grant of the reverſion, not having notice of the grant, pay his rent to the grantee as a receiver, bailiff, *&c.* this is no good attornment. And therefore if the bailiff of a manor ſhall purchaſe the manor, or the reverſion

Co. ſuper Lit. 310. 11 H. 7. 12.

14 H. 8. 15. 34 H. 6. 41.

Co. ſuper Lit. 312. Calvin's caſe Adjudged Paſc. 7 Jac. B. R. Co. ſuper Lit. 309. Co. 2. 67. Dier 302.

reverſion of one of the tenements, and the tenant, not knowing of the purchaſe, pay his rent to him, as he was wont to do; this is no good attornment in law. So if a man ſeiſed of a ſeigniory levie a fine of it, and then taketh back an eſtate in fee, and the tenant, having no notice of all this, doth pay his rent to the conuſor, as he was wont to do; this is no good attornment in law, to perfect either of theſe grants.

Lit. Sect. 558. 560. &c. If there be Lord and tenant, and the tenant let the land to a woman for life, the remainder in fee, and the woman doth take a huſband, and after the Lord doth grant the ſervices to the huſband in fee; in this caſe, this acceptance of the deed, by him that ought to attorn, is a good attornment in law. So if in this caſe the tenant leaſe to a man for life, the remainder over, and the Lord grant the ſervices to the tenant for life, and he accept thereof; this is a good attornment in law.

Co. ſuper Lit. 313. If the Lord by deed grant his ſeigniory to the tenant of the land and to a ſtranger, and the tenant doth accept of this deed; this is * a good attornment in law, to extinguiſh a moiety, and to veſt the other moiety in the other grantee. So if one make a leaſe to *I. S.* for life, and after confirm his eſtate, the remainder over to *I. D.* and the leſſee for life doth accept of the deed of this confirmation and grant; this is a good attornment in law, and doth veſt the remainder in *I. D.*

* P. 263.

Co. ſuper Lit. 313. Lit. Sect. 573.

Lit. Sect. 559. If there be Lord and tenant, and the tenant take a wife, and after the Lord doth grant the ſervices to the wife and her heirs, and the huſband doth accept of the deed of this grant; this is a good attornment in law.

Lit. Sect. 564. If the conuſee of a fine of ſervices, ſue a *Scire facias* to have execution of the ſervices, and hath judgment to recover; this is a good attornment in law.

Co. ſuper Lit. 310. If a woman grant a reverſion to a man in fee, and after marry with the grantee; this is a good attornment in law, to perfect this grant made to the huſband.

Lit. Sect, 563. If a Lord grant his ſeigniory, and there be twenty manner of ſervices, and the tenant, with what intent ſoever it be, pay or perform in deed any parcel of the ſervices to the grantee; this is a good attornment in law for all the ſervices.

Lit. Sect. 576, 577. Co. ſuper Lit. 319. Dier 212. Co. 6. 68. 5. 113. If I be ſeiſed of land in fee, and make a leaſe for life or years of it, or it be extended by a ſtatute or *Elegit*, and then I make a feoffment of this land, and give livery of ſeiſin upon it, and ſo put out the tenant, and after the tenant (or one of the tenants, if there be many) re-enter; this is a good attornment in law. And ſo alſo it ſeems is the law, if the leſſee for life recover in an aſſiſe. But if a man make a leaſe for life, and then the leſſor grant the reverſion for life, and the leſſee attorn, and after the leſſor enter and make a feoffment in fee, and ſo diſſeiſe the leſſee for life, and then the leſſee re-enter; this is no good attornment in law by the grantee for life. And if the conuſee of a reverſion by fine diſſeiſe the leſſee for life, and make a feoffment in fee, and the leſſee re-enter; this is no good attornment in law to the feoffee, to enable him to diſtrain, *&c.*

Hil. 8 Jac. If one grant the reverſion of a leaſe of a term of years, and before any attornment made, the leſſee for years doth grant his term to the grantee of the reverſion; in this caſe, this is no good attornment in law, to make the reverſion paſs.

If one have land, and a rent iſſuing out of other land, both in one county, and he grant both by deed, and give livery of ſeiſin of the land in the name both of the land and of the rent; this is no good attornment in law, to make the grant of the rent good. Perk. Sect. 231.

If leſſee for life, or years, ſubſcribe his name as a witneſs to the ſealing and delivery of the grant of the reverſion, made by the leſſor to a ſtranger; this is no good attornment in law, for he may do this and not have notice: but if he have notice of the grant, and * then put his hand to it; this is an attornment, *curiâ B. R. H.* 11 *Car.* So was it held in Brokenbury & Martials caſe. 5 Eliz.

* P. 264.

Attornment to part of the grant good for the whole.

If a reverſion be granted of two acres, or for forty years, or if ſervices be granted, and the tenant doth attorn for one acre, or for part of the forty years, or for part of the ſervices; this ſhall extend to all, and is a good attornment for both the acres, all the forty years, and all the ſervices. And that, albeit the tenant ſay expreſly it ſhall be good but for a part, and not for the whole. And ſo alſo it is of an attornment in law. And therefore if the grantee by fine of ſervices, ſue a *Scire facias* to have execution of any part of the ſervices, and have judgement to recover any part; or a leſſee of three acres ſurrender one of them to the grantee of the reverſion of all the three acres; this is a good attornment for the whole. But if one attorn for part of the land, or for part of the ſervices, in caſe of the grant of a reverſion of land, or the grant of ſervices, and have no notice of the grant of any more; this attornment is not good for any part, but void for all. Co. 2. 68. ſuper Lit. 297. 314. 309. Lit. ſect. 564.

Attornment to one good to others.

If a ſeigniory, reverſion, or the like, be granted to two or more, and the tenant after notice thereof doth attorn to one of them; this is a good attornment, to perfect the grant to both or all of them. But if one die before attornment, and the tenant attorn to the ſurvivor or ſurvivors; this ſhall not avail the heir of him that is dead; but it is good to perfect the grant to the ſurviver or ſurvivors, to whom it is made. Co. ſuper Lit. 297. 2. 68. 67.

If a reverſion be granted to huſband and wife, and the tenant attorn to the wife in the abſence of the huſband; this is a good attornment, to perfect the grant to them both. But if a reverſion be granted to two men, and the tenant have notice only of a grant made to one of them, and he attorn to him only; this attornment is void, and not good to perfect the grant to either of them. Calvins caſe Paſc. 7 Jac. B. R. Co. 2. 68.

Attornment by one good for others.

If two joint-tenants be for life, or years, and the reverſion of their eſtate is granted to a ſtranger, and one of them attorn to the grant of the reverſion; this is a good attornment for both of them. The like law is for tenants in common. But if *A. B. C.* and *D.* be leſſees for years, and *C.* and *D.* be outlawed, ſo as they forfeit their parts to the King, and the King become tenant in common with *A.* and *B.* and after the reverſion is granted to a ſtranger, and *A. B. C.* and *D.* attorn; this is no good attornment to perfect the grant of the reverſion; for *C.* and *D.* cannot attorn, and the attornment of *A.* and *B.* for the King and themſelves is not good. Co. 2. 66, 67. Lit. Sect. 566. 6 Car. in the Lord Brooks caſe in the Court of Wards.

9. Who ſhall be compelled to attorn: or not: and where.

Attornment made by the huſband is good for the wife: whereof ſee before at *Numb.* 5.

In all caſes for the moſt part where attornment is needful, the tenant, whether he be tenant in fee-ſimple, for life, years, by * ſtatute, elegit, or as executor until debts be paid, ſhall be Co. 6. 68. 9. 84. ſuper Lit. 315.

* P. 265.

compelled to attorn. And albeit the tenant be an infant, and come to the land by purchaſe or deſcent, yet he may be compelled to attorn; but then in this caſe his attornment ſhall not prejudice him; for when he is of full age, he may diſclaim, or ſay he doth hold by leſs ſervices.

Co. ſuper Lit. 316. 318. If there be tenant in tail of a reverſion, and he grant this over to a ſtranger; in this caſe the tenant in poſſeſſion may be compelled to attorn. But if the reverſion, upon the eſtate of the tenant in tail, or upon the eſtate of the tenant in tail after poſſibility of iſſue extinct, be granted, ſuch a tenant may not be compelled to attorn; and yet ſuch a tenant may attorn *gratis* if he will. And the aſſignee of the eſtate of ſuch a tenant in tail after poſſibility &c. is compellable to attorn. And if one make a gift in tail, the remainder in fee, and the ſeigniory, or a rent charge iſſuing out of the land, is granted in fee by fine; in this caſe, the tenant in tail may be compelled to attorn.

Co. 6. 68. ſuper Lit. 318. In all caſes for the moſt part where attornment is not needful, there is no means to compel the tenant to attorn. And therefore the tenant cannot be compelled to attorn to him that comes to a reverſion or remainder by eſcheat, forfeiture, &c.

Co. ſuper Lit. 318. 3. 86. If one grant his reverſion of land in mortmain without a licence, the tenant may not be compelled to attorn, until there be a licence had from the King.

Co. ſuper Lit. 318. 3. 86. Alſo it is a general rule, that when the grant by fine is defeaſible, there the tenant ſhall not be compelled to attorn. As if an infant levy a fine, this is defeaſible by writ of error during his minority, and therefore the tenant ſhall not be compelled to attorn. So if the land be holden in ancient demeſne, and he in the reverſion levieth a fine of the reverſion at the common law; the tenant ſhall not be compelled to attorn, becauſe the eſtate that paſſeth is reverſible by a writ of deceit.

10. How an attornment ſhall enure and be taken.

Co. ſuper Lit. 309. 310. 297. See before. If the grant be abſolute, and the attornment be on condition; yet this ſhall enure according to the grant. So if the attornment be but to part of the things or part of the time granted; this ſhall enure to perfect the grant for all. So if the attornment be made but to one of the grantees, it ſhall enure to the reſt. So if the attornment be made to the particular tenant, it ſhall enure to him in the remainder, to perfect his eſtate alſo.

Co. ſuper Lit. 320. If the eſtate of the tenant be with a priviledge annexed, as without impeachment of waſte, or the like, and the tenant attorn generally without any ſaving of his priviledge; if the attornment be *gratis* and voluntary, whether it be an attornment in law or in deed, this ſhall not enure to extinguiſh his priviledge: but if the attornment be made by the compulſion of a writ in this * manner, and without this ſaving, he hath loſt his priviledge for ever. * P. 266.

Co. ſuper Lit. 310. If a reverſion, &c. be granted to two ſeveral men one after another, and he that hath the latter grant get the attornment of the tenant to his grant before the other; in this caſe, this ſhall enure to perfect the latter, and the firſt grant now cannot be made good.

Co. ſuper Lit. 310. If a reverſion be granted to a man and woman unmarried, and before attornment made they intermarry, and then the tenant attorn; in this caſe they ſhall have the eſtate by moieties.

An

11. How an attornment ſhall relate.

An attornment as to the party grantor ſhall have relation to the time of the grant, to make the thing to paſs out of the grantor *ab initio*, albeit it be made many years after the grant; and therefore all acts done by him after the time of the grant, and before the attornment, to the prejudice of his own grant, as granting of rents, entring into ſtatutes, or the like, are void as to the land, to charge it: and hence it is that if a reverſion be granted to an alien, and before the attornment of the tenant he is made denizen; in this caſe, the King upon office found ſhall have the land; and yet it ſhall not ſo relate, as to make the tenant chargeable to the grantee for any meſne arrearages, or for any waſte in the lands from the time of the grant to the time of the attornment. But in reſpect of a ſtranger it ſhall not relate at all. And therefore if two deeds be of a reverſion at ſeveral times, and he whoſe deed was made laſt gets attornment firſt, the reverſion doth paſs to him; and though the other get attornment afterwards, yet this will not help him by relation; and albeit the former grant of the reverſion be in fee, and the latter for life only, yet the law will be all one in both caſes. Co. ſuper Lit. 310.

And now having done with this, we come to a *leaſe*.

CHAP. XIV.

CHAP. XIV.

Of a Leaſe.

Termes of the law. Co. ſuper Lit. 42. 45. Juſtice Doddrige treatiſe called the uſe of the law. Bro. Leaſes 60. 437. Plow. 421. 432. Dier 125.

A Leaſe doth properly ſignify a demiſe or letting of lands, rent, common, or any hereditament, unto another for a leſſer time than he that doth let it hath in it. (For when a leſſee for life or years doth grant over all his eſtate or time unto another, this is more properly called an aſſignment than a leaſe.) And this, albeit it may be made and done by other words, yet it is moſt commonly and aptly made by the words demiſe, grant, and let. And in this caſe he that letteth is called the leſſor, and he to whom it is let the leſſee. This word alſo is ſometimes although improperly applied to the eſtate, *i. e.* the title, time, or intereſt the leſſee hath to the * thing demiſed, and then it is rather referred to the thing taken or had, and the intereſt of the taker therein; but in this place, it is applied rather to the manner or means of attaining or coming to the thing letten. And in this ſenſe it is ſometimes made and done by record, as fine, recovery, *&c.* and ſometimes and moſt frequently by writing called a leaſe by indenture, albeit it may be made alſo by deed poll. And ſometimes alſo it is (as it may be of land, or any ſuch like thing grantable without deed for life or never ſo many years) by word of mouth without any writing, and then it is called a leaſe parol (1). And hence comes the diviſion of a leaſe parol, and a leaſe in writing. And all theſe ways it may be made either for life, *i. e.* for the life of the leſſee, or another, or both; or for years, *i. e.* for a certain number of years, as ten, an hundred, a thouſand, or ten thouſand years, months, weeks or days, as the leſſor and leſſee do agree. And then the eſtate is properly called a term of years: for this word term doth not only ſignify the limits and limitation of time, but alſo the eſtate and intereſt that doth paſs for that time: theſe leaſes alſo for years do ſome of them commence *in preſenti*, and ſome *in futuro*, at a day to come: and the leaſe that is to begin *in futuro*, is called an *intereſſe termini*, or future intereſt (2). Or at will, *i. e.* when a leaſe is made of land to be held at the will and pleaſure of the leſſor, or at the will and pleaſure of the leſſor and leſſee together: and ſuch a leaſe may be made by word of mouth as well as the former (3).

1. *Quid.*

Aſſignment.

Leſſor. Leſſee.

* P. 267.

2. *Quotuplex:*

Term of years.

Intereſſe termini, or future intereſt.

See Grant Numb. 4. Co. 6. 36. 34. 35. 1. 154. 155.

Regularly theſe things muſt concur to the making of every good leaſe. 1. As in other grants, ſo in this, there muſt be a leſſor, and he muſt be a perſon able, and not reſtrained to

3. Things neceſſarily required in every good leaſe.

(1) But by ſtat. 29th *Car.* 2. *c.* 3. leaſes of lands muſt be in writing and ſigned by the parties themſelves, or their agents duly authorized; otherwiſe they will operate only as leaſes at will, *except* leaſes not exceeding three years.

(2) *Ante* page 241.

(3) Mr. Juſtice *Blackſtone* in a note to the 2d vol. of his *Com.* p. 323. for the learning relative to leaſes, which he ſays is very curious and diffuſive, refers the ſtudent to *Bac. Abr. Tit.* leaſes and terms for years; where the ſubject is treated in a perſpicuous and maſterly manner, being ſuppoſed to be extracted from a manuſcript of Sir *G. Gilbert*. The Editor of the 13th edit. of *Co. Lit.* in note 5. to p. 45. a. ſpeaks of the ſame book with equal commendation.

make that leaſe. 2. There muſt be a leſſee, and he muſt be capable of the thing demiſed, and not diſabled to receive it. 3. There muſt be a thing demiſed, and ſuch a thing as is demiſable. 4. If the thing demiſed be not grantable without a deed, or the party demiſing not able to grant without deed, the leaſe muſt be made by deed. And if ſo, then there muſt be a ſufficient deſcription and ſetting forth of the perſon of the leſſor, leſſee, and the thing leaſed, and all neceſſary circumſtances, as ſealing, delivery, *&c.* required in other grants, muſt be obſerved. 5. If it be a leaſe for years, it muſt have a certain commencement, at leaſt then when it comes to take effect in intereſt or poſſeſſion, and a certain determination, either by an expreſs enumeration of years, or by reference to a certainty that is expreſt, or by reducing it to a certainty upon ſome contingent precedent by matter *ex poſt facto*, and then the contingent muſt happen before the death of the leſſor or leſſee. 6. There muſt be all needful ceremonies, as livery of ſeiſin, attornment, and the like, in caſes where they are requiſite. 7. There muſt be an acceptance of the thing demiſed, and of the eſtate, by the leſſee. But whether any rent * be reſerved upon a leaſe for life, years, or at will, or not, is not material, except only in the caſes of leaſes made by tenant in tail, huſband and wife, and eccleſiaſtical perſons. Of which ſee *infra*.

Co. ſuper Lit. 45. 46. Plow. 273. 523.

* P. 268.

4. What ſhall be ſaid a good and a ſufficient leaſe for life or years: or not. 1. In reſpect of the perſons of the leſſor, and the leſſee, the thing leaſed, and the eſtate, property, or poſſeſſion of the leſſor therein.

For the ability and capacity of the leſſors and leſſees; and what ſhall be ſaid a good leaſe or not, in reſpect of the ability of the leſſor, and the capacity of the leſſee; and the deſcription of their perſons; the nature and deſcription of the thing demiſed; and what miſ-recital, or miſ-nomer will hurt, or not; ſee *Grant numb.* 4. and *infra numb.* 5, 6, 7.

Leaſes for life, or years, or at will, may be made of any thing corporeal or incorporeal, that lieth in livery, or grant. Alſo leaſes for years may be made of any goods or chattles. See for this, *Grant numb.* 4.

Bro. Leaſes 23.

A man ſeiſed of an eſtate in fee-ſimple in his own right of any lands or tenements, may by deed or writing in the country, or without writing by word of mouth, make a leaſe of it for what lives or years he will (1). And he that is ſeiſed of an eſtate in tail of any lands or tenements, may make any leaſe out of it for his own life, but not longer; unleſs it be by fine or recovery, or it be ſuch a leaſe as is warranted by the ſtatute of 32 *H.* 8. (whereof ſee more *infra*). And he that is ſeiſed of lands or tenements of any eſtate for his own or another's life, may make what leaſe for years he will of it, and it will be good as long as the leaſe for life doth laſt. And he that is poſſeſſed of lands or tenements for years may make a leaſe of it for all or part of the years, and theſe are good leaſes. The tenants for life or years may alſo aſſign over all their eſtates if they pleaſe. And if ſuch tenants make leaſes for longer time, as if leſſee for years make a leaſe for life; it ſeems by this the land will paſs for life, if the term of years laſt ſo long. But if he give livery of ſeiſin upon it (as he muſt to make the leaſe for life good) this is a forfeiture of the eſtate for years (2).

Co. 7. 12. 1. 44. Plow. 524.

(1) See the notes before as to the ſtat. 29. *Car.* 2. *c.* 3.
(2) See accordingly *ante* in page 242.

If

9 H. 7. 24. 18 Ed. 4. 2. Plow. 545.

If an infant be ſeiſed of land in fee-ſimple, and he make a leaſe for years of it rendering no rent; this leaſe is void. But if there be a rent reſerved upon the leaſe, then the leaſe is but voidable, and may, by the acceptance of the rent by the infant after his full age, be made good (1).

Forfeiture. Infant. Acceptance.

Lit. cap. tenant in common, F. N. B. 62. G.

Joint-tenants, tenants in common, and parceners may make leaſes for life, or years, of their own parts and purparties at their pleaſures, and theſe leaſes will bind their companions. And one coparcener, or tenant in common, may make a leaſe of his part to his companion if he will (2).

Joint tenants. Tenants in common.

If a feoffment be made upon condition, and before the time of performance of the condition, the feoffor and feoffee do join to make a leaſe for life or years of the land; this is a good leaſe.

Bro. Leaſes 58.

* A man that hath an eſtate in land to him and his wife, and his heirs, may make what leaſe he will of the land, and this will be good againſt all men but his wife only, and that for her time (3).

* P. 269.

Co. 10. 49.

If there be leſſor in fee, and leſſee for ten years; in this caſe, they two may join together and make a leaſe for lives, or for any term of years; and this is good.

Plow. 133.

A diſſeiſee cannot make a leaſe of that land whereof he is diſſeiſed, until he make his entry, or recover the poſſeſſion of the land again. So neither can a woman that hath recovered the third part of her huſband's land in a writ of dower, make any leaſe of it before ſhe be in poſſeſſion by execution. And yet if a leaſe be made to me for years, I may make a leaſe of part, or an aſſignment of all the term, before I have made my entry into the land demiſed. So if the father die, and the ſon make a leaſe to a ſtranger of the land deſcended to him before his entry; this is a good leaſe: but if a ſtranger had entred and abated into the land, and then the ſon had made the leaſe, *contra*.

Bro. Scire facias 36. Co. ſuper Lit. 46. Plow. 137. 142.

Co. 5. 5. Dier 357. Co. 6. 2. 8. 70. 1. 175. See in leaſes made by tenant in tail infra.

In ſome caſes alſo ſuch perſons as are not ſeiſed in fee ſimple, *&c.* nor able to derive ſuch eſtates for life or years out of their own eſtates, may lawfully notwithſtanding make ſuch leaſes for life, *&c.* And this is ſometimes by ſome ſpecial act of Parliament enabling them ſo to do. And hence it is alſo that a tenant in tail may make leaſes for three lives or twenty one years. And ſometimes it is by ſome ſpecial power or authority that is given or reſerved by and to the party himſelf, that had the fee ſimple in him, or given to ſome other to do it in his name; and leaſes thus made, may be good. And

By ſpecial power or proviſo to make leaſes.

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(1) In 3 *Burr.* 1806. it is ſaid to have been long ſettled.—"That an infant *may* make a leaſe *without* rent to try his title."—See alſo *Co. Lit.* 308. a. 1 *Rol. Abr.* 729. ſee further as to leaſes by infants, the diſagreements of the books, reſpecting them, diſcuſſed, and the authorities relating thereto, in *Bac. Abr.* leaſes (B.) leaſes by *Guardian.* ibid. (I. 9.)—*Vin. Abr.* Enfant. (B.) —— By the ſtat. 29 *Geo.* 2. *c.* 31. *Infants, lunaticks,* and *femes covert,* may apply to the Courts of Chancery, or Exchequer; or to the Courts of Equity of the counties palatine of *Cheſter, Lancaſter,* and *Durham*; or to the Courts of Great Seſſion of *Wales*; by petition or motion, in a ſummary way; and by the order of thoſe courts reſpectively, ſuch perſons may by deed only, without levying a fine, ſurrender leaſes for lives or years, and take new leaſes for lives or years of the premiſes compriſed therein.

(2) If joint-tenants join in a leaſe, this ſhall be but one leaſe; for they have but one freehold;—but if tenants in common join in a leaſe, it ſhall be ſeveral leaſes of their ſeveral intereſts,—2 *Roll. Abr.* 64.—*Com. Dig.* Eſtates (G. 6.)—See more amply in *Bac. Abr.* Leaſes (I. 5).

(3) If a man is poſſeſſed of a beneficial leaſe for a term of years in right of his wife as executrix to her former huſband, he may grant and convey the ſame.—*Thruſtout* v. *Coppin.* 2 *Wilſ. Rep.* 277.

therefore if any Act of Parliament enable a tenant in tail, or a tenant for life, to make leaſes for three lives, or twenty one years; leaſes that are ſo made in purſuit of that authority, are good. And if a man be ſeiſed of land in fee, and convey it to the uſe of himſelf for life, or in tail, with divers remainders over, with a proviſo that it ſhall be lawful for him, or any ſuch tenant in tail, to make leaſes for twenty-one years; in this caſe he, or they, may make ſuch leaſes, and they will be good. But in both theſe caſes care muſt be had to purſue the authority ſtrictly, *i. e.* that the leaſes made be according to the power and direction given by the ſtatute or proviſo; for if it differ and vary ever ſo little from the ſenſe and meaning of the ſame, the leaſe will not be good. And therefore in the caſe before of a power to make leaſes for twenty-one years, if the party make more leaſes for twenty-one years at one time than one, they are all void but the firſt; becauſe it is againſt the intent of the parties, though it be not againſt the words (1). And ſo if the power be to make leaſes for three lives; he cannot by this make a leaſe for ninety-nine years if three lives ſo long live. But if the power be thus, provided, *&c.* that he may make any leaſe in * poſſeſſion or reverſion, ſo as it doth not exceed the number of three lives or twenty-one years; in this caſe a leaſe may be made for ninety-nine years if three lives live ſo long. But where uſes are raiſed by way of covenant, and in the deed there is a proviſo, that the covenantor for divers good conſiderations may make leaſes for years; in this caſe, this power is void, and therefore no leaſe can be made hereupon: neither will any averment help in this caſe. And if a man have a letter of attorney, or other authority to make leaſes for another, and he doth make them accordingly; ſuch leaſes are good. But herein alſo caution muſt be had of three things: 1. That the authority be good. 2. That he that is the deputy or attorney do purſue the authority ſtrictly. 3. That he do it in the name of his maſter, and not in his own name (2).

* P. 270.

Averment.

Co. 9. 76.

2. In reſpect of the manner of the agreement, and the words whereby the ſame is ſet down: and what words will make an eſtate for life or years.

A leaſe made for a thouſand days, months, or weeks, is as good, for ſo long as it endureth, as a leaſe for an hundred or a thouſand years. So a leaſe for half a year, or a whole year, is good. So if a leaſe be made from day to day, or from week to week, for four years; this is good leaſe for four years, *et*

Co. 6. 72. 14 H. 8. 13.

Plow. 422.

Livery of ſeiſin.

(1) The limitation and modifying of eſtates, by virtue of powers, came from equity into the common law, with the ſtatute of uſes. The *intent* of parties who gave the power, ought to govern every conſtruction. He to whom it is given, has a right to enjoy the full exerciſe of it: they over whoſe eſtate it is given, have a right to ſay "it ſhall not be exceeded." The conditions ſhall not be evaded; it ſhall be *ſtrictly purſued*, in form and ſubſtance: and all acts done under a ſpecial authority, *not* agreeable thereto, nor warranted thereby, muſt be *void*.——Of all kinds of powers, the moſt frequent is that "to *make leaſes*." For the encouragement of farmers, to occupy, ſtock, and improve the land, it is neceſſary they ſhould have ſome *permanent* intereſt. Unleſs the owner of the eſtate for life was enabled to make a *permanent* leaſe, he could not enjoy to the beſt advantage, *during* his own time: and they who came *after*, muſt ſuffer, by the land being untenanted, out of repair, and in a bad condition. The plan of this power is for the mutual advantage of poſſeſſor and ſucceſſor. The execution thereof is checked with many conditions, to guard the ſucceſſor; that the annual revenue ſhall not be diminiſhed; nor thoſe in ſucceſſion or remainder, at all prejudiced in point of remedy, or other circumſtance of full and ample enjoyment, *per* Ld. *Mansfield* 1 *Burr.* 120.—If a man hath power to leaſe for ten years and he leaſeth for twenty years; the leaſe for twenty years ſhall be good for ten years of the twenty, in equity.—1 *Chan. Ca.* 23.—See more amply how a power to make leaſes ſhall be expounded. *Com. Dig.* Poiar. (B.)—*Bac. Abr.* Leaſes (I. 10. and 11.)—*Denn* v. *Fearnſide* 1 *Wilſ. Rep.* pt. 1. p. 176.—*Fearne on Cont. Rem.* 3d edit. 90.

(2) See accordingly, and further in 1 *Wood* 684.—A leaſe made by an attorney in his own name, and the covenants to pay the rent are void.—*Frontin* v. *Small*, 2 Ld. *Raym.* 1419.—S. C. *Str.* 705.

Plow. 272. Bro. Leaſes 49. *ſic de ſimilibus.* So if one make a leaſe for ten years, and ſo from ten years to ten years, during an hundred years, or until an hundred years are incurred; this is a good leaſe for an hundred years.

Dier 24. So if one make a leaſe from three years to three years, during the life of *I. S.* in this caſe if livery of ſeiſin be not given, this is a good leaſe for ſix years; but if livery be given, it is a good leaſe for the life of *I. S* (1). And if a leaſe be made from my death until *anno Domini* 1650; this is a good leaſe. Livery of ſeiſin.

Co. 6. 26. If I ſay to *I. S.* being in my houſe [here *I. S.* I demiſe to you my houſe and land ſo long as I live;] this is a good leaſe for life to him, if livery of ſeiſin be made. *Et ſic de ſimilibus.* Livery of ſeiſin.

21 Aſſ. pl. If one make me a leaſe of land until an hundred pounds be paid me, and make livery of ſeiſin upon it; this is a good leaſe for life, determinable upon the payment of the hundred pounds. But, if no livery be made, it is no good leaſe. Livery of ſeiſin.

Bro. Leaſes 27. 51. If one make a leaſe to me for my life, and for four, ten, or twenty years after; this is a good leaſe for life firſt, if livery of ſeiſin be made, and then a good leaſe for years, for ſo many years as are agreed upon afterwards, which my executors ſhall have. And if no livery of ſeiſin be made; yet it ſeems it is a good leaſe for ſo many years after my death. Executors.

Co. 1. 153. Dier 253. If an indenture of leaſe be made between *A.* of the one part, and *B. C.* and *D.* of the other part, and therein *A.* doth demiſe land to *B.* to have and to hold to him for eighty years, if *B.* ſhall live ſo long, and if he die, or alien the premiſſes within the term, then that his eſtate ſhall ceaſe, and then the leſſor doth grant the land to *C.* for ſo many years of the ſaid term as ſhall be then to come after * the death or alienation of *B.* if he live ſo long; in this caſe this is a good leaſe to *B.* for ſo many years as he ſhall live of the eighty years; but the leaſe to *C.* after is not good, for the term is ended by the death of *B.* but if the words of the ſecond demiſe be, to have and to hold during the reſidue of the eighty years, and not during the reſidue of the term; in this caſe the ſecond demiſe is good to *C.* alſo. * P. 271.

Co. 1. 155. Dier 150. 253. If one make me a leaſe for ſixty years if I live ſo long; provided that if I die within the term, that my executors ſhall have it during the reſidue of the ſixty years; in this caſe, this is a good leaſe for the ſixty years determinable upon my death, but not a good leaſe for the reſidue of the ſixty years after my death. And yet it may amount to a good covenant for that time.

Ev-n's caſe Trin. 5 Jac. B. R. If *A.* covenant to levy a fine to *B.* and his heirs; provided that if he pay to *B.* and his heirs ten pounds at the end of thirteen years, that then the fine ſhall be to the uſe of *A.* and his heirs; and *A.* doth covenant with *B.* by the ſame deed, that *B.* his heirs, executors, and aſſigns, ſhall quietly hold the premiſſes from *Michaelmas* next for thirteen years, and yearly from thenceforth for ever, if the ten pounds be not paid according to the intent; in this caſe, this covenant doth not Covenant.

(1) Leaſe for one year, and ſo for two or three years, or any further term of years as leſſor and leſſee ſhall think fit and agree, after the expiration of the ſaid term of one year, this is a good leaſe for two years, and after every ſubſequent year begun, is not determinable till that be ended.—1 *Wilſ. Rep.* pt. 1. p. 262.

Covenant.

make a good leaſe for the thirteen years, and it is but a covenant.

If one make a leaſe for a certain number of years, and it is further agreed that upon ſome contingent the leſſee ſhall have the fee ſimple, and livery of ſeiſin is given hereupon; in this caſe, the leaſe for years doth continue good for the time agreed upon. Plow. 272. Lit. Sect.

A leaſe for years cannot by the agreement of the parties be made to the heirs of the leſſee, nor intailed to the heirs of his body. And therefore if a leaſe be made to *I. S.* and his heirs, or to *I. S.* and the heirs male of his body; yet the executors of *I. S.* and not his heirs, ſhall have it, and the executors may ſell the term. Co. 2. 24. 10. 87.

Executors.

If two agree by word, that one of them ſhall have ſuch a piece of land for twenty years; this is a good and perfect leaſe that is made by this agreement, albeit they do agree to have a writing made of it afterwards; for in this caſe the writing is but the confirmation of it. But if the agreement be, that ſuch a writing ſhall be made, or that a leaſe ſhall be made of ſuch a thing between them and put in writing, ſo that the agreement hath reference to the writing, and implieth an intent not to perfect the agreement until the writing be made; in this caſe, the leaſe is not a perfect leaſe until the writing be made. Per Juſtice Jones at the aſſizes at Glouc.

Albeit the moſt uſual and proper making of a leaſe is by the words, demiſe, grant, and to ferme let, and with an *Habendum* for life or years, yet a leaſe may be made by other words; for whatſoever word will amount to a grant will amount to a leaſe (1). And * therefore a leaſe may be made by the word, give, betake, or the like. The word *Locavit* alſo is a good word. And the uſe in the exchequer is to make leaſes by the word *committimus*, which is a good word to make a leaſe. [d] And if *A.* do but grant and covenant with *B.* that *B.* ſhall enjoy ſuch a piece of land for twenty years; this is a good leaſe for twenty years (2). [e] So if *A.* promiſe to *B.* to ſuffer him to enjoy ſuch a piece of land for twenty years; this is a good leaſe for twenty years. [f] So if *A.* licenſe *B.* to enjoy ſuch a piece of land for twenty years; this is a good leaſe for twenty years (3). And therefore it is the common courſe, if a man make a feoffment in fee, or other eſtate, upon condition, that if ſuch a thing be, or be not done at ſuch a time, that the feoffor, *&c.* ſhall re-enter, to the end that in this caſe the feoffor, *&c.* may have the land and continue in poſſeſſion until that time, to make a covenant that he ſhall hold and take the profits of the land until that time; and this covenant in this caſe will make a good leaſe for that time, if the incertainty of the time (whereunto care muſt be had) do not make it void. And therefore if *A.* bargain and ſell his land to *B.* on condition to re-enter if he pay him an hundred pounds, and *B.* doth covenant with *A.* that he will not take the profits until default of payment, or that *A.* ſhall take the profits until default of payment; in this caſe, howbeit this may

Co. ſuper Lit. 5. F. N. B. 270. e. Bro. Leaſes 71.

* P. 272.

d] Bro. Leaſes 60.

e] Mic. 9 Jac. B. R. Curia.

f] 5 H. 7. 1. Agreed by all the Judges Mic. 20. Jac. et per Juſt. Bridgman. And 8 Car. B. R.

(1) See before in page 230, and notes 3 and 4 thereto.

(2) It is ſaid to be a general rule *that the word covenant will make a leaſe, tho' the word grant be omitted*, and much more when the words are *to hold, enjoy*, &c. *Gilb.* L. of Covenants 26. 2 *Mod.* 80.——See further in *Cro. Jac.* 659. *Cro. Car.* 207.—*Hob.* 35.—3 *Bulſt.* 252.

(3) And may be pleaded as ſuch, though it may be alſo pleaded as a licence; and if it be pleaded as a licence for years and traverſed, the leſſee may give the licence in evidence to prove it.—*Bac. Abr.* Leaſes (K).

be

be a good covenant, yet it is no good leaſe. And if the mortgagee covenant with the mortgagor that he will not take the profits of the land until the day of payment of the money; in this caſe albeit the time be certain, yet this is no good leaſe, but a covenant only. If one give a bond for the quiet holding of a cloſe for three years; it ſeems this is no leaſe in law. See the opinion of the Parliament for *bonds* and *covenants* both, *ſtat.* 14 *Eliz. cap.* 11. (1).

3. In reſpect of the commencement, & continuance, and end of the term or eſtate.

Incertainty.

Co. 5. 1. ſuper Lit. 48. Plow. 156. 197. A leaſe for years may begin at a day to come, as at *Michaelmas* next, or three or ten years after, or after the death of the leſſor or of *I. S.* and it is as good as where it doth begin preſently. But a leaſe for life of any thing whatſoever, whether it lye in livery or in grant, if it be *in eſſe* before, cannot begin at a day to come. And therefore if a leaſe be made, *Habendum* from *Michaelmas* next, or from the day of the making of it, or after the death of the leſſor, or after the death of *I. S.* to the leſſee for life; this leaſe is not good: but in caſe of a leaſe of land made thus, it is ſometimes holpen by the livery of ſeiſin. For which ſee *livery of ſeiſin, chap.* 9. *numb.* 11. But all leaſes for years, whether they begin *in preſenti*, or *in futuro*, muſt be certain, that is, they muſt have a certain beginning, and certain ending, and ſo the continuance of the term muſt be certain, otherwiſe they are not good. And yet if the years be certain, when the leaſe is to take effect in intereſt or poſſeſſion, it is ſufficient; for until that time it may depend upon an incertainty, *viz.* upon a * poſſible contingent precedent before it begin in poſſeſſion or intereſt, or upon a limitation or condition ſubſequent: but in caſe when it is to be reduced to a certainty upon a contingent precedent, the contingent muſt happen in the lives of the parties. And albeit there appear no certainty of years in the leaſe, yet if by reference to a certainty it may be made certain it is ſufficient: *Id certum eſt quod certum reddi poteſt.* As for examples, if *A.* ſeiſed of lands in fee, grant to *B.* that when *B.* ſhall pay to *A.* twenty ſhillings, that from thenceforth he ſhall hold the land for twenty-one years, and after *B.* doth pay the twenty ſhillings; in this caſe, *B.* ſhall have a good leaſe for twenty-one years from thenceforth (2). And if *A.* grant to *B.* that if his tenant for life ſhall die, that *B.* ſhall have the land for ten years; this is a good leaſe. And if one make a leaſe for years after the death of *C.* if *C.* die within ten years; this is a good leaſe if *C.* die within the ten years, otherwiſe not. But if *A.* be ſeiſed of land in fee, and leaſe it to *B.* for ten years, and it is agreed between them that *B.* ſhall pay to *A.* an hundred pounds at the end of the ſaid ten years, and that if he do ſo and ſhall pay the ſaid hundred pounds, and an hundred pounds at the end of every ten years, that then the ſaid *B.* ſhall have a perpetual demiſe and grant of the premiſſes from ten years to ten years, continually following, *extra memoriam hominum, &c.* in this caſe, this, albeit it be a good leaſe for the firſt ten years, yet it is void for all the reſt for incertainty. And if a leaſe

Co. ſuper Lit. 45. Co. 1. 155.

Co. ſuper Lit. 45. Plow. 83. 524. Co. 6. 35. 1. 155.

Plow. 270.

Hil. 16 Jac. in the Exchequer.

* P. 273.

(1) See more fully, by what words leaſes may be made,—*Co. Lit.* 45. b. 301. b.—1 *Wood* 370.—*Vin. Abr.* Eſtates. (T. a.) (X. a).

(2) Or where a man makes a leaſe from the feaſt of *St. Michael* for ſo many years as *I. S.* ſhall name.—If *I. S.* name a certain term (in the life of the leſſor) it is then a good leaſe by matter *ex poſt facto*. So it is of all leaſes which are to commence on a condition precedent.—6 *Co.* 35. b.

be made to begin from the Nativity of Chriſt, and he doth not ſay which nativity, as next, *&c.* it is void for incertainty. And yet if a leaſe for years be made of land in leaſe for life, to have and to hold from the death of the tenant for life; this is a good leaſe: ſo if it be, to have and to hold from *Michaelmas* next after the death of the tenant for life, or from *Michaelmas* next after the determination of the eſtate of the tenant for life; theſe are good leaſes. So if there be a former leaſe in being for life or years, and another leaſe for years is made of the land, to have and to hold from the end of the former eſtate by ſurrender, forfeiture, or otherwiſe, for twenty years; or to have and to hold from the ſurrender, forfeiture, or other determination of the former leaſe, if there be any, and if there be none, for twenty years; theſe and ſuch like leaſes are good, and this commencement is certain enough. And if one make a leaſe to begin after the death of *I. S.* and to continue until *Michaelmas*, which ſhall be in *anno Domini* 1650. this is a good leaſe.

Plow. 192. 523. Co. 6. 36. Plow. 523. & 17 Jac. B. R. Agree.

If a man have a leaſe of land for an hundred years, and he make a leaſe of this land to another, to have and to hold to him for forty years to begin after his death; this is a good leaſe for the whole forty years, if there ſhall be ſo many of the hundred years to come at the time of the death of the leſſor. But if the leſſor grant the land to * another, to have and to hold to him for and during all the reſidue of the term of an hundred years that ſhall be to come at the time of the death of the grantor; this is void for incertainty. And yet if in this caſe he grant all his eſtate, or all his term, or all his intereſt, in the premiſſes of the deed, and then ſay, to have and to hold the land, *&c.* to the grantee for all the reſidue of the term of an hundred years that ſhall be to come at the time of his death; by this the whole eſtate and intereſt of the grantor in the land doth paſs preſently by theſe words in the premiſſes of the deed. And if in this caſe the leſſee for an hundred years make a leaſe of the land, to have and to hold after his death for an hundred years; this will be a good leaſe for as many of the firſt hundred years as ſhall be to come at the time of his death.

* P. 274.

Lit. Bro. Sect. 437. Bro. Grant 154. Co. 1. 2. 155. Plow. 520. 521. See Expoſition of Deeds.

If *A.* make a leaſe to *B.* for ninety years to begin after the death of *A.* on condition to be avoided upon the doing of divers acts by others; and afterwards makes another leaſe of the land, *Habendum* after the determination or redemption of the former leaſe; it ſeems this is a good leaſe and certain enough. But if a leaſe be made to *A.* for eighty years if he live ſo long, and if he die within the ſaid term or alien the premiſſes, that then his eſtate ſhall ceaſe; and then he doth further by the ſame deed grant and let the premiſſes for ſo many years as ſhall then remain unexpired after the death of *A.* or alienation to *B.* for the reſidue of the ſaid term of eighty years, if he ſhall live ſo long; in this caſe, the leaſe to *B.* is void; for after the death of *A.* the term is at end; but if he ſay for the reſidue of the eighty years, it is otherwiſe.

Per Juſtice Bridgman. Co. 4. 153. Dier 253.

If *A.* doth make a leaſe of land to *B.* for ſo many years as *B.* hath in the manor of *Dale*, and *B.* hath then a leaſe for ten years of the manor of *Dale*; in this caſe, this is a good leaſe for ten years. But if *A* make a leaſe of land to *B.* for ſo many years as the land *B.* hath in execution ſhall be in execution; this leaſe

Plow 271. 523. 522. F.N.B 6.N. 14 H. 8. 11. Co. 6. 35.

is void for incertainty. And if a leaſe be made during the minority of *I. S.* or until *I. S.* ſhall come to the age of twenty-one years, theſe are good leaſes; and if *I. S.* die before he come to his full age, the leaſe is ended. But if a leaſe be made to another until a child that is now in its mother's belly ſhall come to the age of twenty-one years; this leaſe is not good. And if a leaſe be made for ſo many years as *I. S.* ſhall name; in this caſe, if *I. S.* do name a certain number of years in the life time of the party leſſor, this is a good leaſe. But if a leaſe be made for ſo many years, as the executor of the leſſor, or of the leſſee ſhall name; this leaſe is void.

Co. ſuper Lit. 45. Plow. 27. If a man make a leaſe for twenty-one years, if *I. S.* live ſo long; or if the coverture between *I. S.* and *D. S.* ſhall ſo long continue; or if *I. S.* ſhall continue to be Parſon of *Dale* ſo long; theſe and ſuch like leaſes are good. But if *A.* make a leaſe to *B.* for ſo many years as *A.* * and *B.* or either of them ſhall live, not naming any certain number of years; this cannot be a good leaſe for years. So if the Parſon of *Dale* make a leaſe of his glebe for ſo many years as he ſhall be Parſon there; this is not certain, neither can it be made ſo by any means. And yet if a Parſon ſhall make a leaſe from three years to three years ſo long as he ſhall be Parſon; this is a good leaſe for ſix years if he continue Parſon ſo long, and for the reſidue void for incertainty. So if I make another a leaſe of land until he be promoted to a benefice; this is no good leaſe for years, but void for incertainty (1). * P. 275.

Co. 6. 35. 14 H. 8. 10. Plow. 274. If I have a rent-charge of twenty pounds *per annum*, and let it to another until he have levied an hundred pounds; this is a good leaſe for five years. But if I have a piece of land of the value of twenty pounds *per annum*, and I make a leaſe of it to another until he ſhall levy out of the profits thereof an hundred pounds; this is no good leaſe for years, but void for incertainty.

Plow. 27. Co. 6. 35. But here note in all theſe caſes of incertain leaſes made with ſuch limitations as aforeſaid, as until ſuch a thing be done, or ſo long as ſuch a thing continue, *&c.* that if livery of ſeiſin be made upon them, they may be good leaſes for life determinable on theſe contingents, albeit they be no good leaſes for years. Note.

Co. ſuper Lit. 46. 10 Ed. 3. 26. And in ſome ſpecial caſes a leaſe may be good notwithſtanding ſome incertainty in the continuance of it, for a leaſe may ceaſe for a time and revive again, as if tenant in tail make a leaſe for years reſerving twenty ſhillings, and after take a wife and die without iſſue; in this caſe, as to him in reverſion the leaſe is meerly void, but if he indow the wife of the tenant in tail of the land, as to the wife it is revived again. So if tenant in tail make a leaſe for years rendring rent, and die without iſſue, his wife enceint with a ſon, and he in reverſion enter, in this caſe as againſt him the leaſe is void, but after the ſon is born the leaſe is good again if it be within the ſtatute. So if tenant in fee ſimple take a wife, and then make a leaſe for

(1) In what caſes leaſes ſhall be void for uncertainty. See 1 *Mod.* 180.—1 *Str.* 651.—1 Ld. *Raym.* 737. *Vin. Abr.* Eſtate (Y. a.)——As to the commencement of a leaſe, *ante* in page 105, and the references in the note thereto; and more amply as to the certainty requiſite in leaſes for years, with reſpect to their beginning, continuance, and ending, in 2 *Bl. Com.* 143.—*Bac. Abr.* Leaſes (L.)—*Com. Dig.* Eſtates (G. 8).

years and dieth, the wife is indowed; in this caſe ſhe ſhall avoid the leaſe, but after her deceaſe the leaſe ſhall be in force again.

4. In reſpect of another leaſe then in being of the ſame thing.

If a leaſe be made for life, or years, to *A.* and after the leſſor doth make a leaſe for years by word, or in writing, to *B.* regularly this concurrent leaſe to *B.* is a good leaſe at leaſt for ſo many years of the ſecond leaſe as ſhall be to come after the firſt leaſe is determined according to the agreement; as if the firſt leaſe to *A.* be for twenty years, and the ſecond leaſe to *B.* be for thirty years, and both begin at one time; in this caſe, the ſecond leaſe is good for the laſt ten years (1). And yet the reverſion will not paſs without the attornment of the tenant, and therefore if any rent be reſerved on the firſt leaſe, the ſecond leſſee ſhall not have it until the firſt leſſee doth attorn. But if the ſecond leaſe be for the ſame or for a leſs * time, as if the firſt leaſe be for twenty years, and the ſecond leaſe be for twenty or for ten years to begin at the ſame time; theſe ſecond leaſes are for the moſt part void. And yet herein a difference is taken between leaſes made by matter of record and by writing, and leaſes that are made by word of mouth: for if the ſecond leaſe be made by fine, deed indented, or poll, albeit it be but for the ſame or for a leſſer time, and albeit it be a leaſe of the land itſelf, and not of the reverſion, yet it will paſs the rent reſerved upon the firſt leaſe if the firſt leſſee attorn, and ſo alſo it will do without attornment where attornment is not needful. But if the ſecond leaſe be made by word of mouth it is otherwiſe, for a reverſion and a rent in this caſe will not paſs without deed, and therefore a grant by word doth not paſs them. And if the ſecond leaſe be by fine or deed indented, then alſo it will work by way of eſtoppel both againſt the leſſor and againſt the leſſee, ſo that if the firſt leaſe happen by any means, as by ſurrender or otherwiſe, to determine before it be run out, then the ſecond leſſee ſhall have it; and if there be any rent reſerved upon the ſecond leaſe, the leſſee muſt pay it from the time of the making of the leaſe (2). And therefore if one make a leaſe of land to *A.* for ten years, and after make a leaſe to *B.* of the ſame land from *Michaelmas* next for ten years, and before *Michaelmas* the firſt leſſee doth purchaſe the fee-ſimple, ſo that now by this means his term is drowned; in this caſe, the ſecond leaſe ſhall begin at *Michaelmas*. So if one make a leaſe to *A.* for twenty years, and *A.* make a leaſe of the land to *B.* for two years rendring rent, and after *A.* makes a leaſe for the reſt of his time to *C.* by deed; this leaſe, if the leſſee for two years do attorn, is a good leaſe of the rent and reverſion; and ſo it is alſo without attornment, if there be any conſideration given for it, for then it is alſo a good leaſe for all the reſt of the

Plow. 433. 421. 273. Co. 1. 155. Bro. Leaſes 73. 10. Plow. 521. Co. 4. 58.

* P. 276.

Dier 58, 356. Plow. 421. 422. Co. 1. 155.

Eſtoppel.

Dier 112, Plow. 432.

Co. 4. 53.

(1) See the caſe of *Daviſon* on demiſe of *Bromley* v. *Stanley*. 4 *Burr.* 2210. The queſtion in that caſe was "whether an acceptance of a *ſecond* leaſe operated as a ſurrender of the *former* leaſe." And it was agreed that the acceptance of a ſecond *good* leaſe will operate as a ſurrender of a former. But the reaſon does not hold, in the caſe of accepting a new *void* leaſe, or one that the leſſee cannot enjoy.

(2) Eſtoppels ought to be mutual, otherwiſe neither party is bound by them; therefore if a man takes a leaſe for years of his own lands from an infant or feme covert by indenture, this works no eſtoppel on either part, becauſe the infant or feme, by reaſon of their diſability to contract are not eſtopped; therefore neither ſhall the leſſee be eſtopped, becauſe all eſtoppels ought to be mutual.—*Cro. Eliz.* 37. 371.—For the rules reſpecting eſtoppels ſee *Co. Lit.* 352. a.—and more amply as to leaſes for years *by eſtoppel*, how far, and againſt whom, ſuch leaſes are good, in *Bac. Abr.* Leaſes (O).

term

term after the two years. So if one make a leaſe to *A.* for twenty years, if he live ſo long, rendring rent, and after he doth make a leaſe to *B.* by indenture for eighty years to begin preſently, or grant the reverſion to begin at a day paſt, or the like; in all theſe caſes, if the firſt leſſee attorn the rent will paſs, but if not, it will be a good leaſe of the land for ſo many of the years as ſhall be to come after the firſt leaſe ended. But if the ſecond leaſe be by parol without a deed, the reverſion, as a reverſion, will not paſs, and the grant will be void if there be nothing elſe to help it. And in caſes where the ſecond leaſe is void, albeit the firſt leſſee ſurrender his eſtate, or his eſtate end by a condition; yet the ſecond leaſe is not hereby made good. But if the ſecond leaſe for years after another leaſe for life, or years, be made for money, ſo as it may be ſaid to paſs * by way of bargain and ſale; this may help the matter, for in this caſe, albeit it be by word only, it may paſs the reverſion and the rent alſo: but in moſt caſes it is good for the remainder of the term after the firſt leaſe ended. And if the ſecond leaſe be to begin after the end of the former leaſe; in this caſe, the former leaſe is no impediment at all to the validity of the latter leaſe, but the latter leaſe is good notwithſtanding.

Co. 1. 155. Plow. 432. 434. Hil. 6 Jac. Adjudged Finch verſ. Vaughan. Dier 112. Co. 2. 35. 36.

* P. 277.

Any perſon whatſoever of full age, that hath any eſtate of inheritance in fee tail in his own right, of any lands, tenements, or hereditaments, may at this day without fine or recovery make leaſes of ſuch lands for lives, or years, and ſuch leaſes ſhall be good, ſo as theſe conditions and incidents following, be therein obſerved and kept.

Stat. 32 H. 8. cap. 28. Co. ſuper Lit. 44.

5. What leaſes, or other acts, may be made or done by a tenant in tail: and what leaſes made by ſuch a tenant ſhall be good to bind the iſſue, or him in remainder, or others after the death of the tenant in tail: and how they ſhall bind.

1. Such leaſes muſt be by deed indented, and not by deed poll, or by parol.

2. They muſt be made to begin from the day of the making thereof, or from the making thereof. And therefore a leaſe made to begin from *Michaelmas* which ſhall be three years after, for twenty-one years; or a leaſe made to begin after the death of the tenant in tail, for twenty one years, is not good. But if a leaſe be made for twenty years to begin at *Michaelmas* next; it ſeems this is a good leaſe.

Co. 5. 6. Dier 246.

3. If there be an old leaſe in being of the land, the ſame muſt be ſurrendred, or expired and ended within a year of the time of the making of the new leaſe; and this ſurrender muſt be abſolute and not conditional; alſo it muſt be real, and not illuſory, or in ſhew only. For *factum non dicitur quod non perſeverat.*

Co. 5. 2.

4. There muſt not be a double or concurrent leaſe in being at one time, as, if a leaſe for years be made according to the ſtatute; he in the reverſion cannot afterwards expulſe the leſſee and make a leaſe for life or lives, or another leaſe for years according to the ſtatute, nor *è converſo.* But if a leaſe for years be made to one, and afterwards a leaſe for life is made to another, and a letter of attorney is made to give livery of ſeiſin upon the leaſe for life, and before the livery made the firſt leaſe is ſurrendred; in this caſe, the ſecond leaſe is good.

Co. 5. 2. Spark's caſe. Trin. 4 Jac. B. R.

5. Theſe leaſes muſt not exceed three lives, or twenty-one years from the time of the making of them (1). And there-

Co. 5. 6. Dier 246.

(1) For the words of the ſtatute are, to make a leaſe for three lives, *or* twenty-one years, ſo that either one or the other may be made, but not both.—*Co. Lit.* 44. b.—See further *Bac. Abr.* Leaſes (E.) Rule 4.

fore if tenant in tail make a leaſe for twenty-two or for forty years, or for four lives; this leaſe is void, and that not only for the overplus of time more than three lives or twenty-one years, but for that time of three lives or twenty-one years alſo. And it hath been reſolved, that if tenant in tail make a leaſe for ninety-nine years determinable upon three lives; that this is not a good leaſe. But if a leaſe be made by a tenant in tail for a leſſer time, as for two lives, or for twenty years, this is a good leaſe. And if a leaſe be made for four lives, and * it happen that one of the lives die before the tenant in tail die; yet this accident will not make the leaſe good, but it remains voidable notwithſtanding.

* P. 278.

6. Theſe leaſes muſt be of lands, tenements, or hereditaments manurable or corporeal, which are neceſſary to be let, and whereout a rent by law may be iſſuing and reſerved. And therefore if a tenant in tail make a leaſe of ſuch a thing as doth lie in grant, as an advowſon, fair, market, franchiſe, or the like, out of which a rent cannot be reſerved, eſpecially if it be a leaſe for life; this leaſe is void, and that albeit the thing have been anciently and accuſtomably let. And a grant of a rent-charge therefore out of ſuch lands is void. And if tenant in tail make a leaſe for three lives of a portion of tithes rendring rent; this leaſe is unqueſtionably void. And ſo alſo it ſeems it is if it be a leaſe for twenty-one years (1).

Co. 5. 2. Tallentine's caſe, Paſch. 3 Jac. B. R. Co. 11. 60. Trin. 2 Jac. B. R. Adjudged Doddington's caſe.

7. They muſt be of ſuch lands, or tenements, which have been moſt commonly let to farm, or occupied by the farmers thereof by the ſpace of twenty years next before the leaſe made, ſo as if it have been let for eleven years, at one or ſeveral times within twenty years before the new leaſe made, it is ſufficient. And albeit the letting have been by copy of court roll only, yet ſuch a letting in fee, for life, or years, is a ſufficient letting, and ſo alſo is a letting at will by the common law. But theſe lettings to farm muſt be made by ſuch as are ſeiſed of an eſtate of inheritance, for if it have been only by guardian in chivalry, tenant by the curteſy, in dower, or the like; this will not ſerve to be a letting within the intent of the ſtatute.

Co. 6. 37. Dier 271.

8. There muſt be reſerved upon ſuch leaſes yearly during the ſame leaſes, due and payable to the leſſor and his heirs to whom the reverſion ſhall appertain, ſo much yearly farm or rent, or more, as hath been moſt accuſtomably yielded or paid for the lands, *&c.* within twenty years next before ſuch leaſe made. And therefore if the rent be reſerved but for part of the time of the new leaſe, this leaſe is void. And if the tenant in tail have twenty acres of land that have been accuſtomably let, and he make a leaſe of theſe twenty acres, and of one acre more which hath not been accuſtomably let, reſerving the uſual yearly rent, and ſo much more as to exceed the value of the other acre; this is not a good leaſe by the ſtatute. So if the tenant in tail of two farms, the one at twenty pounds rent, the other at ten pounds rent, and he make a leaſe of both

Co. 5. 8. 6. 6. 37.

(1) This diſtinction is no longer of any importance; for the 5th *Geo.* 3. *c.* 17. makes leaſes of *incorporeal hereditaments* by eccleſiaſtical perſons, as good as if the leaſes were of *corporeal hereditaments*, whether ſuch leaſes are for lives or years; and gives action of debt to the ſucceſſor for rent, which (in caſe of a freehold leaſe) he could not have brought at the common law. See further in note 3 to 13th edit. *Co. Lit.* 44. b.

theſe

theſe farms together, at thirty pounds rent; this is not a good leaſe within the ſtatute. But if beſides the annual rent there have been formerly reſerved things not annual, as heriots, fines, or other profit upon the death of the farmors, or profit out of anothers ſoil, as paſturage for a colt, *&c.* if upon the new leaſe the yearly rent be reſerved, albeit theſe * collateral reſervations be omitted, yet theſe leaſes are good. And ſo alſo if there be more rent reſerved upon the new leaſe than the rent that hath been anciently paid, the leaſe is good notwithſtanding. And yet if tenant in tail of land let a part of it that hath been accuſtomably let, and reſerve the rent *pro rata*, or more than after the rate; this is not a good leaſe. And yet if two coparceners have twenty acres of land of equal value between them in tail, and theſe have been uſually let, and they make partition of theſe lands, ſo as each of them hath ten acres; in this caſe they may make leaſes of their ſeveral parts, reſerving the half of the accuſtomable rent. And if upon the old leaſe the rent were payable at four days in the year, and by the new leaſe it is reſerved to be paid at one day; this is not a good leaſe. But if the rent upon the old leaſe be payable in gold, and the new rent be payable in ſilver; it ſeems the leaſe is not good. And if a tenant in tail be of a manor, that hath been uſually demiſed for ten pounds rent, and after a tenancy eſcheat, and then he doth make a leaſe of the manor, rendring ten pounds rent by the year; in this caſe, this is a good leaſe; but if the leſſor purchaſe a tenancy, then it ſeems it is otherwiſe,

Co. 6. 37. 38. Trin. 3 Jac. B. R. Adjudged, Adjudged Trin. 18 Jac. B. R. Co. 5. 6.

* P. 279.

Co. 5. 5. And yet Co. ſuper Lit. 44. b. is contra.

Trin. 3 Jac. B. R. Cornwall's caſe. Co. 5. 5.

Co. 5. 6.

9. Such leaſes muſt not be without impeachment of waſte. And therefore if tenant in tail make a leaſe of his land intailed without impeachment of waſte; this leaſe is void. And if a leaſe be made for life, the remainder for life, *&c.* this is not a good leaſe; for in this caſe, during the remainders, the tenant for life cannot be puniſhed for waſte done. But if ſuch a tenant of land make a leaſe of it to *I. S.* for the lives of three others; this is a good leaſe, albeit it may afterwards become an occupancy (1).

Waſte.

Co. 6. 37. & Meer's caſe Adjudged.

Stat. 11 H. 7. 20. Co. 3. 51.

10. Such leaſes muſt not be againſt any ſpecial Act of Parliament. And therefore if a woman that is tenant in tail of the gift of her deceaſed huſband, or of any of his anceſtors, while ſhe is ſole, or after with another huſband, make any ſuch leaſe warranted by this ſtatute; yet this leaſe is not good.

11. They muſt have all due ceremonies and circumſtances for the perfection of them, as other ſuch like leaſes have, as livery of ſeiſin, and the like, where they are needful. And then only when leaſes have theſe conditions, and are made according to theſe proviſions, are they ſaid to be within this ſtatute of 32 *H.* 8. and ſuch only as do bind the tenant in tail himſelf, and the iſſue in tail; for otherwiſe if it be not warranted by this ſtatute, albeit it will bind the tenant in tail himſelf that made it, yet it will not bind his iſſue; but as to him it will be void, or voidable at the leaſt: for if tenant in

Co. 7. 7. 8. 34. Dier 7. 8. The woman's Lawyer 173. Plow. 435.

(1) The learned author of the commentary, in the 2d vol. p. 319. mentions theſe *nine* requiſites, as neceſſary to be obſerved in leaſes by tenants in tail,—huſbands ſeized in right of their wives,—and perſons ſeized in fee-ſimple in right of their churches;—and adds, theſe are the guards, impoſed by the ſtatute 32 *H.* 8. *c.* 28. (which was avowedly made for the ſecurity of farmers and the conſequent improvement of tillage) to prevent unreaſonable abuſes, in prejudice of the iſſue, the wife, or the ſucceſſor, of the reaſonable indulgence given by that ſtatute.

tail of land make a leaſe of it for an hundred years without any rent reſerved thereupon; this leaſe as to the iſſue in tail is void: but if he make a leaſe of his land for an hundred years * rendering rent, and have iſſue and die; in this caſe the leaſe is only voidable by the iſſue at his pleaſure; and therefore if the iſſue accept the rent after the death of the tenant in tail, by this means the leaſe is affirmed and become good. But howſoever the leaſe be made, it will not bind him that comes in of a remainder over, nor him that is the donor. And therefore if a tenant in tail make a leaſe warranted by the ſtatute, and after die without iſſue, ſo that the land doth remain over to another, or revert to the donor; in theſe caſes neither he in the remainder, nor the donor ſhall be bound by this leaſe, for as to them the leaſe is void. And yet by a common recovery the tenant in tail may make leaſes of, or lay charges upon the land to bind the donor and him in remainder alſo. But otherwiſe it is of a fine; for if tenant in tail make a leaſe for years by fine, this will not bar the donor, nor the remainder in any caſe where it is in a ſtranger. And yet if the remainder be in the tenant in tail himſelf, and he make a leaſe for years by deed according to the ſtatute or by fine; this leaſe is good, and ſhall bind his own remainder (1).

Plow. 436.

* P. 280. Acceptance.

6. What leaſes, or other acts, may be made or done by the huſband with the lands he hath in fee-ſimple, or fee-tail in the right of his wife, or jointly with her: and what leaſes made by him of ſuch lands are good: or not: and how.

The huſband may at this day without fine or recovery make leaſes of the lands, tenements, or hereditaments, whereof he hath any eſtate of inheritance in fee ſimple, or fee tail, in the right of his wife, or jointly with his wife, made before or after the coverture; ſo as there be in ſuch leaſes obſerved the eleven conditions or limitations before required in the leaſes made by tenant in tail; and ſo that the wife do join in the ſame deed, and be made party thereunto, and do ſeal and deliver the ſame deed herſelf in perſon. For if a man and his wife make a letter of attorney to another to deliver the leaſe upon the land; this leaſe is not a good leaſe from the wife warranted by the ſtatute. And yet then as in other like caſes of leaſes not warranted by this ſtatute, it is a good leaſe againſt the huſband. And when the leaſe is ſuch a leaſe as is warranted by the ſtatute, it doth bind the huſband and wife both, and the heirs of the wife; but if it be an eſtate tail, it doth not bind the donor nor him in remainder.

Stat. 32 H. 8. cap. 28. Co. ſuper Lit. 44.

Paſc. 7 Jac. B. R.

If the huſband and wife at the common law had joyned in a leaſe of her land without rendring of rent; this leaſe had been void as againſt the wife, and ſo is the law ſtill.

26 H. 8. 2.

If the huſband at the common law had been ſeiſed of land in the right of his wife, and he had made a leaſe for years rendring rent and died; this leaſe had been void, and ſo is the law ſtill.

26 H. 8. 2. Co. 2. 77.

If the huſband and wife at the common law had made a leaſe by word rendring rent; this leaſe had been void as againſt the wife; and ſo is the law ſtill.

Dier 91.

* P. 281.

* The huſband and wife together may by fine, or recovery, make what leaſes they will of her land, or charge it for what time they will; and ſuch leaſes and charges will be good

Stat. 32 H. 8. ch. 28. See the woman's lawyer 163.

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(1) See accordingly verbatim in 1 *Wood* 686-7.—as to the doctrine of leaſes by tenant in tail, ſee *Bac. Abr.* Leaſes (D.) under the three following heads.—1ſt. What leaſes tenant in tail might have made by the common law.—2d. What leaſes he may now make to bind his iſſue ſince the ſtatute 38 *H.* 8. *c.* 28.—3d. In what caſes the iſſue in tail or ſtrangers ſhall be bound by voidable leaſes made by tenant in tail:—and further in *Vin. Abr.* Eſtate (I. a. 2.)—*Com. Dig.* Eſtates (B. 32).

againſt

againſt the huſband and wife both and their heirs alſo. But if the huſband alone do levy any fine of his wife's land, and thereby make any eſtate whatſoever; this will not bind the wife after her huſband's death, but ſhe may avoid it (1). And if the huſband and wife make a leaſe of her land rendring rent to them and the heirs of the wife; (as in ſuch leaſes it ought to be;) in this caſe, the huſband cannot by fine or otherwiſe, grant or diſcharge this rent longer than during coverture, unleſs the wife join in the fine, but the rent ſhall deſcend, remain or revert, in ſuch ſort and manner as the land ſhould have done (2).

7. What leaſes, or other acts, Biſhops, or other ſpiritual or eccleſiaſtical perſons, may make or do with the lands they have in the right of their churches or houſes: and what leaſes made by ſuch perſons will bind their ſucceſſors and others: or not.

Co. ſuper Lit. 44. Co. 5. 14. 11. 66.

Biſhops with the confirmation of the Dean and Chapter, Parſons or Vicars with the conſent of their Patrons and Ordinaries, Archdeacons, Prebends, and ſuch as are in the nature of Prebends, as Precentors, Chaunters, Treaſurers, Chancellors, and ſuch like, alſo Maſters and Governors and Fellows of any colledges or houſes, (by what name ſoever called) Deans and Chapters, Maſters or Guardians of any hoſpital and their brethren, or any other body politic, ſpiritual and eccleſiaſtical *(Concurrentibus his quæ in jure requiruntur)* might by the ancient common law have made leaſes for lives or years, or any other eſtates of their ſpiritual or eccleſiaſtical living for any time without ſtint or limitation. And at this day the Biſhops, and the reſt of the ſaid ſpiritual perſons, except Parſons and Vicars, may make leaſes of their ſpiritual livings for three lives, or twenty-one years, and ſuch leaſes will be good both againſt themſelves and their ſucceſſors. But ſuch perſons may not make leaſes or eſtates for any longer time than for three lives or twenty-one years, and if they do, albeit it be by fine or recovery, or it be confirmed by the Dean and Chapter, *&c.* yet it is void as againſt the ſucceſſor. Neither will the leaſes made by ſuch perſons for three lives or twenty-one years be good, unleſs they have certain conditions and properties required in them. Theſe things therefore are neceſſarily required to be obſerved in the making of ſuch leaſes: 1. That they have the effect of all the qualities or properties before mentioned and required by the ſtatute of 32 *H.* 8. in the leaſe made by the tenant in tail, and be made after that pattern, *viz.* That they be by deed indented. 2. That they do begin from the time of the making of them. 3. and 4. That the old leaſe be ſurrendred, and there be not a concurrent leaſe (ſave in caſe of a Biſhop). And therefore if any ſuch perſon make a leaſe for twenty-one years to one, and then make a leaſe for three lives to another; this ſecond leaſe is void. And yet if a Biſhop make a leaſe for twenty-one years to one man, and then within a year after make another leaſe to another for * twenty-one years to begin from the making of it, this, ſo as it be confirmed by Dean and Chapter is reſolved to be a good leaſe. 5. That they do not exceed three lives or twenty-one years, but they may be for a leſs time. 6. That they be of lands or tenements manurable or corporeal. 7. That they be made

Stat. 32 H. 8. ch. 28. 13 El. ch. 10. 1 Jac ch. 3. 1 El. ch. 19. 14 El. ch. 11. 18 El. ch. 10. 20.

Co. ſuper Lit. 44. Co. 11. 66. 5. 3. 15.

* P. 282.

(1) Leaſe made by baron of lands in right of his wife is not abſolutely *void* on baron's death, but *voidable* only by the entry of the feme.—See *Jordan* v. *Wikes*, *Cro. Jac.* 332.—*Hob.* 5.

(2) See more amply as to leaſes by huſband and wife by the common law or by ſtat. 32. *H.* 8. in *Bac. Abr.* Leaſes (C.)—*Com. Dig.* Baron and Feme (G. 3.)—1 *Wood* 688.—Note 2 to 13th edit. *Co. Lit.* 44. a.—and *Vin. Abr.* Baron and Feme (E. a. 10).

of lands that have been commonly let to farm by the ſpace of twenty years before. 8. That there be reſerved upon them the ancient and accuſtomed rent payable to the leſſor and his ſucceſſors during the time (1). 9. That they be not made without impeachment of waſte. 10. That there be livery of ſeiſin upon them, *&c.* where it is requiſite. 11. If the leaſe be made according to the exception of the ſtatute of 1 *Eliz.* and 13 *Eliz.* and not warranted by the ſtatute of 32 *H.* 8. as in the caſe of a concurrent leaſe, and it be made by a Biſhop, or any ſole corporation, it muſt be confirmed by the Deans and Chapters, or others, that have intereſt. And if a Parſon, or Vicar, make a leaſe, it is not good but during the Parſon or Vicars reſidence according to the ſtatute of 13 *Eliz. chap.* 20. and in this caſe there needs no confirmation at all (2). 12. Some of the leaſes that are made by the colledges and houſes of the univerſity, *&c.* muſt have ſome rent-corn reſerved upon them. But Biſhops, Deans, Parſons, and ſuch like ſpiritual perſons cannot grant the next advowſons of churches, neither can they grant rents out of their ſpiritual livings, but the ſame charges will be void after their death. And if a Biſhop ſuffer an annuity to be recovered againſt him by a pretence of title of preſcription, on a judgment after a verdict or confeſſion; or a Parſon in ſuch a caſe pray in aid of the patron, and ſo ſuffer an annuity to be recovered; this will not bind the ſucceſſor. And yet a Biſhop, or any ſuch ſpiritual perſon, may grant ancient offices of truſt, of neceſſity, or conveniency, as the offices of chancellor, regiſter, ſteward, bailiff, or the like, with the ancient fees incident thereunto, for the life or lives of the grantees; and ſuch grants are good, albeit they be made by the Biſhops of the new erected biſhopricks, and that there be not in them the conditions and properties required in the leaſes before mentioned, ſo as they be confirmed by the Dean and Chapter. But they may not grant any new office, nor yet add any new fee to the old offices. And therefore if a Biſhop grant an annuity *pro conſilio impenſo & impendendo* where none was before; this will not bind the ſucceſſor. And yet if there be an old fee, and there is a new fee added to it; in this caſe it ſeems it is good for the old fee, albeit it be void for the new fee. Neither may they grant their offices otherwiſe than they have been granted. And therefore where the ancient grants of the office have been to one, it cannot be now granted to two. And where the ancient grants have been to two jointly, they may not be now granted in remainder one after another. Neither may the grants of theſe offices be longer than for * the life or lives of the grantees. And in caſe where the grant is void, the confirmation of the Dean and Chapter will not make it good (3).

Co. 11. 66. 5. 3.

Stat. 18 El. cap. 20. Co. 5. 15. 11. 66. 10. 58. Dier 370. And moſt of theſe points were agreed by Juſtice Jones and Juſt. Whitlock at Lent Aſſizes at Gloc. 6 Car.

* P. 283.

Note. But here note, that albeit in all theſe caſes of leaſes and grants, not warranted by the ſtatutes aforeſaid, the ſtatutes ſay

Co. ſuper Lit 45 329, 3 59. 10. 59. 11. 73. 78. 5. 5.

(1) Leaſe by biſhop, and more than the old rent reſerved, held good by *North* C. J. *Wyndham* and *Atkyns*.—but the caſe was argued when *Vaughan* was C. J. and he and *Ellis* were of a different opinion. See the caſe of *Threadneedle* v. *Lynham*, 2 *Mod.* 57.

(2) By the ſtat. 22 *Car.* 2. *c.* 11. §. 75.—Intitled "an additional act for rebuilding the city of *London*, &c." *Parſons* and *Vicars* in *London* were impowered to leaſe their glebe for forty years with the conſent of the patron and ordinary.—See fully as to leaſes by *Parſons* and *Vicars*, in *Bac. Abr.* Leaſes (F).

(3) As to the grant of offices, ſee before in page 238. and the books referred to in note 2. thereto.

the leaſes ſhall be void; yet this is to be underſtood as againſt the ſucceſſors, and not againſt the leſſors themſelves; for the leaſes are good ſo long as the leſſors live, or at leaſt ſo long as they continue in the place. And therefore if ſuch a leaſe be made by a Dean and Chapter, or other corporation aggregate; it is good as againſt the Dean or other head of the corporation, ſo long as he doth continue in his place (1). And if a Biſhop make any leaſe or other grant, not warranted by the ſtatute of 1 *Eliz.* or a Dean and Chapter, Maſter and Fellows of a College, or the like, make leaſes not warranted by the ſtatute of 13 *Eliz. cap.* 10. theſe leaſes are good againſt themſelves, albeit they are void againſt their ſucceſſors. So as if a private Act of Parliament doth entail land upon a man, and appoint him what eſtates he ſhall make, and that if he make any other eſtates they ſhall be void; in this caſe, they ſhall not be void as to the tenant in tail himſelf that doth make them.

Stat. 13 El. cap. 20. Leaſes of benefices with cure are no longer good than the Parſon is reſident.

Leaſes made by Colleges muſt have reſerved upon them the third part of the rent in corn. See the ſtatute of 18 *Eliz. cap.* 20. (2).

Co. ſuper Lit. 55. 56. 270. 14 H. 8. 12. If one make a leaſe to another, during the will and pleaſure of him that letteth, or him that taketh, or both (for ſo in effect is every leaſe at will;) this is a good leaſe at will (3). So if one make a feoffment in fee, or leaſe for life, *&c.* and doth not make livery of ſeiſin and ſo perfect the eſtate; the feoffee or leſſee hath only an eſtate at will. But if a bargain and ſale be made of land, and the ſame is void; or a corporation grant land, and the grant is void; by this there is no leaſe at will made (4).

8. What ſhall be ſaid a good leaſe at will: or not.

Co. ſuper Lit. 45. 3. 59. 65. 7. 8. Leaſes for lives, or years, are of three natures; ſome be good in law, ſome be voidable by entry, and ſome void without entry. And of ſuch as be good in law, ſome be good at the common law, as leaſes made by tenant in fee-ſimple notwithſtanding they be for longer time than three lives or twenty-one years; ſome by Act of Parliament, as leaſes made by tenant in tail; leaſes made by a Biſhop ſeiſed in fee in the right of his church, alone, without the Chapter: leaſes made by a man ſeiſed in fee-ſimple or fee-tail of land in the right of his wife, together with his wife, for twenty-one years, or three lives according to the ſtatutes. And of ſuch leaſes as be void alſo, ſome are void at the common law; and that ſometimes *in preſenti*, as in the caſes before of leaſes for years that have no certainty in them, or leaſes for lives made without livery of * ſeiſin, and the like. * P. 284.

9. Where a leaſe for life or years ſhall be void *ipſo facto* by the death of the leſſor or by other means: or not, but voidable by entry, *&c.* and how.

(1) See the caſe of *Lloyd* v. *Gregory*, *Cro. Car.* 502. and the obſervation thereon in *note* 4 to 13th edit. *Co. Lit.* 45. a.

(2) See the obſervations made on the reſtrictive ſtatutes of 1 *Eliz. c.* 19. 13 *Eliz. c.* 10. 14 *Eliz. c.* 11 and 14. 18 *Eliz. c.* 11. and 43 *Eliz. c.* 29. in 2 *Bl. Com.* 321.—and further as to the doctrine of leaſes for lives or years by eccleſiaſtical perſons, in *Vin. Abr.* Eſtate (R. a. 6.) Confirmation (E.)—*Bac. Abr.* Leaſes (E.)—*Com. Dig.* Eſtates (G. 5).

(3) If land be leaſed to *A.* for a year, and ſo from year to year as long as both parties ſhall agree; this is a leaſe for two years certain; and if the leſſee hold on after two years, he is not leſſee at will (as the old opinion was) but for a year certain, for his holding on is an agreement to the original contract: but if the original contract were only for a year, or if it were at 8*l.* *per annum* rent without mentioning any time certain, it would be a tenancy at will after the expiration of the year, unleſs there were ſome evidence by a regular payment of rent annually or half yearly, that the intent of the parties was that he ſhould be tenant for a year. *Buller's* Intr. to law of *niſi prius.* 2 edit. 84.

(4) See further as to the doctrine of eſtates at will, 2 *Bl. Com.* 145.—*Vin. Abr.* Eſtate (S. b.) to (C. c. 8.)—*Com. Dig.* Eſtates (H).

And ſome are void in *futuro*, as if a tenant in tail make a leaſe for years warranted, or not warranted, by the ſtatute, and after die without iſſue; this leaſe is void as to him in reverſion or remainder: *Ceſſante ſtatu primitivo ceſſat derivativus*. So if a Prebend, Parſon, or Vicar make a leaſe for years not warranted by the ſtatutes; this is void by the death of the leſſor, and the ſucceſſor need not make any entry or claim to avoid it (1). So if a tenant for life make a leaſe for years, and after die; in this caſe the leaſe for years is void. And therefore in all theſe, and ſuch like caſes, no acceptance of rent after will affirm ſuch leaſes. But otherwiſe it is in caſes of leaſes for years made by Biſhops, albeit they be confirmed by Dean and Chapter; and of leaſes made by Deans and Chapters, or tenants in tail; as to their ſucceſſors and iſſues, when the leaſes are not warranted by the ſtatutes: and otherwiſe it is alſo in the caſe of leaſes for life, made by theſe or any of the former leſſors; for in all caſes of leaſe for life it muſt be avoided by entry, *&c.* and therefore ſuch leaſes are not void but voidable, *viz.* the leaſes of Biſhops and Deans after their death by their ſucceſſors, and that by the ſtatute law; and the leaſes of tenants in tail by their iſſues after their death, and that by the common law. And in theſe, and ſuch like caſes, the acceptance of the rent by the iſſue or ſucceſſor will make good the leaſe, at leaſt for their time.

Acceptance.

Acceptance.

If a leaſe be made for years on condition that upon ſuch a contingent it ſhall be void; in this caſe, as ſoon as the thing doth happen, the leaſe is void *ipſo facto* without any re-entry, *&c.* But if a leaſe for life be made on ſuch a condition; in this caſe, the leſſor muſt enter, *&c.* before the leaſe will be void. Co. 3. 65.

(1) As to void or voidable leaſes by eccleſiaſtical perſons, ſee *Bac. Abr.* Leaſes (H).

CHAP. XV.

CHAP. XV.

Of a Feoffment, Gift, Grant, and Leaſe.

1. Where and by what means a feoffment, gift, grant, or leaſe, and the eſtate thereby made, being good at firſt, becometh void by matter *ex poſt facto*, and may be avoided: or not: and how.

A Feoffment, gift, grant, or leaſe in writing, may become void by raſure, interlining, and the like, as hath been ſhewed before in deed, *ſupra* (1). And a feoffment, gift, grant, or leaſe, and the eſtate thereby made, may become void by forfeiture, or upon a breach of a condition, or by a limitation. For which ſee *condition* (2) and *uſes*. Alſo they may become void by diſagreement or refuſal: and this may be either by the diſagreement of the party himſelf to whom it is made, or by the diſagreement of another: of the party himſelf; for no eſtate can be made to a man of any thing in fee ſimple, for * life, or otherwiſe, againſt his will: and therefore, by his diſagreement or refuſal of it, the eſtate itſelf, and the deed whereby it is conveyed, may become void: by the diſagreement of another; as the huſband, in caſe of a feoffment &c. made to his wife, may by diſagreement avoid it. And for the firſt of theſe the law is thus, that all ſuch acts as give eſtates directly or by way of uſe are good at firſt; and the thing granted, when the deed of grant is delivered to his uſe, ſhall veſt in the grantee, before he hath notice of the grant, or agree to accept of the thing granted; ſo that if lands be limited to a man by way of uſe, or granted immediately by feoffment, gift, grant, or leaſe, or goods or chattles be given or granted to a man; in theſe caſes, the things granted ſhall be ſaid to be in the grantee, and the grant good, before notice and agreement, until diſagreement. And before agreement the grantee may waive it, and ſo avoid the eſtate, and the deed alſo whereby the eſtate is made. And if it be but a leaſe for years that is made; he may waive and avoid that by word of mouth in the country, as well as a gift of goods, or an obligation delivered to his uſe. But if it be an eſtate of freehold that is made by feoffment &c. it ſeems he cannot waive and avoid that but in a Court of Record.

Co. 3. 26. 27. 5. 119. Doct & Stud. 119. Perk. Seſt. 44. 45 Fitz. Done 4. 5. Bro. Done 29. 30. 59.

* P. 285.

When the cauſe of a grant faileth and the thing granted is executory, the grant is become void. As if one grant an annuity for an acre of land, for tithes, or for counſel; in this caſe *pro* is conditional, and therefore if the land be evicted by an elder title, or the grantee diſturbed in the tithes, or he refuſe to give counſel, the annuity is determined. But if a feoffment, or leaſe for life, or years, be made of an acre of land *pro una acra* &c. as in the caſe before; albeit the acre be evicted, &c. yet the grant in this caſe of the acre of land is good. And if one grant an annuity for counſel; if the grantee will not give counſel, the grant is not of force. So if one grant to make new pales in a place for the old pales; if in this caſe he cannot have the old pales, it ſeems the grant ſhall not bind him to make new pales. So if one grant a rent for a way; ſtop the way, and the rent ſhall be ſtopped.

Co. ſuper Lit. 204. Plow. 134. 15 E. 4. 4. Dier 76. 9 E. 4. 20.

(1) See before in page 66.
(2) See before in page 151.

If

If one that hath a leaſe for life or years, of the manor to which an advowſon is appendant, grant the next avoidance that ſhall happen during the leaſe, or grant a rent out of the manor, and then ſurrender the manor ſo that his eſtate is gone; in this caſe notwithſtanding, the grant of the next avoidance, and of the rent, doth continue good; and the grantee ſhall enjoy it according to the grant, as long as the eſtate that is ſurrendred ſhould have had continuance. Co. 8. 144. 145.

If the heir of the King's tenant enter and make a leaſe before livery ſued, and after an intruſion is found againſt him; by this it ſeems the leaſe is avoided. So if tenant in tail make a leaſe warranted by the ſtatute, and after dieth without iſſue; by this the leaſe is determined (1).

* P. 286. If a tenant in tail make a feoffment to his heir within age, and he, after he is of full age, make a leaſe for years of the land, and after the tenant in tail dieth, and the heir is remitted; the leaſe in this caſe is not avoided. Co. ſuper Lit. 349.

If an annuity be granted to one until he be advanced to a benefice by the grantor, and the grantor die, and the heir or executor of the grantor tender a benefice; it ſeems this will not determine the grant. Plow 272. 15 H. 7. 1.

If *A.* be leſſee for years of an advowſon, and grant the next avoidance to *B.* if it ſhall happen to become void during the term, and *A.* doth ſurrender the term to *C.* who hath the inheritance, and the church become void before the end of the term; in this caſe, the grant is good to *B.* and he ſhall have the next avoidance, for a man cannot derogate from his own grant. So if *A.* be leſſee for years, and he grant a rent-charge to a ſtranger, and after ſurrender his term to the leſſor; in this caſe, albeit the term be extinct, yet the rent doth continue, and the ſtranger ſhall have it during the term. So if *A.* have a rent-charge out of the land of *B.* and acknowledge a ſtatute to *C.* and then releaſe the rent to *B.* in this caſe, albeit the rent be gone as to *A.* and *B.* yet it is in *eſſe* as to the conuſee, and he may extend it. Co. 8. 145. 7. 39.

If a man be ſeiſed of a great wood, and grant to *I. S.* ſix hundred coards of wood out of the ſame wood, to be taken by the aſſignment of *A.* in this caſe, if *A.* will not upon requeſt aſſign where the wood ſhall be taken, yet the deed will not loſe its effect, but *I. S.* may take it without aſſignment. Co. 5. 24.

If *A.* be leſſee for life on condition to have fee, and he make a leaſe to *B.* for years and after he perform the condition, and ſo his eſtate for life is turned into a fee ſimple; in this caſe, the leaſe for years is good ſtill notwithſtanding: but otherwiſe it is in caſe of the King. Co. 7. 14.

If *A.* tenant in tail enfeoff *B.* on condition to the uſe of *A.* in fee, and *A.* had granted a rent-charge or acknowledged a ſtatute, which by the ſtatute of 1 *R.* 3. *cap.* 5. was extended, and after *A.* had performed the condition; in this caſe, albeit the eſtate had been changed, yet the intereſt of the grantee or conuſee had continued. Co. 1. 147. 148. 11 H. 7. 21.

If *A.* be tenant for life, the remainder to *B.* in tail, the remainder to *A.* in fee, and *A.* doth grant a rent-charge or acknowledge a ſtatute and die; in this caſe and hereby, the 5 Ed. 4. 2. Pethouſe & Cranes caſe. Mic. 36. 37 El. Co. B.

(1) See accordingly before in page 278.

grant is not become void; but if *B.* die without iſſue, the heir of *A.* ſhall be charged.

Davis Rep. 1. If a corody be granted for a ſervice to be done, the omiſſion of the ſervice doth determine the corody.

20 E. 4. ult. Dier 13. 126. If one grant lands with his daughter in frank-marriage, or goods with his daughter in marriage, and after the marriage is diſſolved, and * they are divorced; in this caſe the grant is now become of no force: *Ceſſante cauſa ceſſat effectus.* * P. 287.

Bro. Grant 103. If one man grant to another an office of charge only, to which there is no benefit or fee incident; in this caſe, he may avoid and determine his own grant at his pleaſure, without any cauſe given. But if there be any fee or profit incident to the office, then he may not avoid the grant of it, or put out the officer, without ſome cauſe of forfeiture: and if he do the grantee may have an aſſiſe. And yet in this caſe alſo he may put him out of the office, albeit he may not deprive him of the fee or profit incident thereunto.

2. Where a man may avoid his own own grant: or not: and when.

Bro Grant. If one grant a ward to another to marry, or for his ſervice; it ſeems he may not afterwards avoid this grant. But if one grant him to another for inſtruction or education, *contra.*

Bro. Grant 128. If one make a leaſe for years of his land rendring rent, and after grant the rent to *I. S.* and the termor attorn, and after the leſſor accept of a ſurrender of the eſtate of the termor; yet this doth not avoid the grant of the rent, but the ſame ſhall continue ſtill.

Lit. Sect. 477. If a diſſeiſor grant a rent, common, or other profit apprender out of the land, and after the diſſeiſee doth enter and infeoff him of the land; in this caſe, the rent is avoided, and the common is gone. But if the diſſeiſee releaſe to the diſſeiſor; in this caſe, he ſhall not avoid his own grant.

An infant, and other diſabled perſons, may impeach and avoid their own grants in divers caſes, which ſee before in *grant* (1).

3. Where and by what means a feoffment, gift, grant or leaſe, or the eſtate thereby made, being void or voidable at the firſt, may become good by matter *ex poſt facto*: or not.

A deed of feoffment *&c.* in ſome caſes is holpen, and a fault therein cured, by the making of livery of ſeiſin. For which ſee *feoffment* and *leaſe.* But an attornment will not help the grant of a reverſion, *&c.* for it is a maxim in law, that attornment cannot make a void grant good.

Co. 1. Capel's caſe. Dier 373. Co. 1. 48. 76. If a tenant in tail make a leaſe for life, or years, of land, and this leaſe is voidable, and after the tenant in tail doth ſuffer a common recovery of the land, to whomſoever it be, by this the leaſe is affirmed and made good during the term, as well againſt the iſſues and heirs by the entail, as againſt him in reverſion or remainder: and ſo it is of a charge of a rent upon the land. And if tenant in tail make a leaſe of the land or charge it, and after levy a fine of the land to a ſtranger, by this the leaſe or charge is become good againſt the iſſue in tail alſo (2).

So held in the Exchequer Hil. 16 Jac. If a tenant in tail make a leaſe for forty years rendring rent, and die, and his iſſue doth leaſe to another by indenture for twenty-one years rendring rent, to begin after the expiration,

(1) See before in pages 7. 54. 231. 232. and the notes and references thereto.

(2) See accordingly the caſe of *Beck*, on demiſe of *Hawkins* v. *Welſh*, in 1 *Wilſ. Rep.* pt. 1. p. 276. where the court reſolved, that if tenant in tail makes a leaſe or mortgage for years, or charges the land with any other incumbrances, and afterwards ſuffers a common recovery, *that* ſhall let *in* all the incumbrances; and the reaſon is, that whatever act binds the tenant in tail himſelf, ſhall bind the recoverors, or the perſon or perſons to whoſe uſe the recovery is ſuffered; for he who recovereth cannot ſay that *he* againſt whom he recovered had but an eſtate in tail.

forfeiture, or ſurrender of the firſt leaſe; it is ſaid this doth affirm the firſt leaſe. *Sed quære.*

Acceptance of rent reſerved on a leaſe for life or years, which is voidable only and not void, may make the leaſe good (1).

* P. 288. * A feoffment, gift, *&c.* that is made by dureſs or menace, and therefore voidable, may by another deed of defeaſance, afterwards made between the ſame parties, become good. Bro. Deſeaſance 17.

Alſo grants, leaſes, and the eſtates thereby made that are not good, may be made good and perfected by releaſe or confirmation. For which ſee *releaſe* and *confirmation*.

4. Where and when a feoffment, gift, grant, or leaſe may be good for one time, and void for another, and good againſt one perſon but void againſt another; and good in part: and void in part: or not.

A feoffment may be good againſt ſome perſons, and void againſt others, but cannot ceaſe and revive and be good and void at ſeveral times; as a leaſe for years, or a grant of rent, *&c.* may in many caſes; for a grant may be ſuſpended, and a leaſe for years may ceaſe and revive again: as if tenant in tail make a leaſe for years, rendring twenty ſhillings rent, and after taketh a wife and dieth without iſſue, and he in reverſion or remainder endoweth his wife (as he may;) in this caſe, the leaſe, as againſt the woman, is revived, albeit it be void as to him in reverſion or remainder. So if tenant in tail make a leaſe for years and die without iſſue, his wife enceint with a ſon, and he in reverſion enter, and after the ſon (being heir to the entail) is born; in this caſe, the leaſe which was before avoided by him in reverſion, if it be ſuch a leaſe as is warranted by the ſtatute, is good againſt the iſſue in tail, and therefore is revived again. So if the King make a gift in tail to *W.* to hold by Knights ſervice, and *W.* doth make a leaſe to *A.* for thirty years reſerving rent, and then *W.* dieth, his ſon and heir of full age; in this caſe, as to the King, this leaſe is void, but after livery ſued out, the leſſee may enter again; and if the iſſue accept the rent, the leaſe is affirmed. So if tenant in tail make a leaſe not warranted by the ſtatute and die, and his heir is in ward; in this caſe, the guardian in the behalf of the heir may avoid the leaſe during the wardſhip; but afterwards the heir may affirm it again, if he accepts of the rent. So if tenant in fee-ſimple take a wife, and then make a leaſe for years and dieth, and the wife is endowed, ſhe ſhall avoid the leaſe for her eſtate, but after her death the leaſe will be in force again. But if the patron grant the next avoidance, and after the Parſon, Patron and Ordinary, before the ſtatutes, had made a leaſe of the glebe for years, and after the Parſon had died, and the grantee of the next avoidance had preſented a Clerk to the church, who had been admitted, inſtituted, and inducted, and had died within the term, and the Patron had preſented a new Clerk to the church, who had been admitted, inſtituted, and inducted; in this caſe the leaſe had not revived again. No more than if a feme covert levy a fine alone, and the huſband doth enter and avoid the fine, the eſtate ſhall revive againſt the wife after his death; for it is avoided as to her alſo as well as to the huſband by his entry. See more in *Deed ſupra cap.* 4. *numb.* 7. Co. ſuper Lit. 46. 7. 8.

Where a feoffment, gift, grant or leaſe is voidable, in ſome

* P. 289. * caſes it may be avoided by the party himſelf that made it,

(1) See accordingly *Rickman* v. *Garth*, *Cro. Jac.* 173. *Pennants* caſe, 3 *Co.* 65.—and further as to affirmance by acceptance of rent in *Com. Dig.* Condition (P.) *Nelſ. Abr. Tit.* Acceptance (A).

and

Co. ſuper Lit. 45. Co. 7. 8. Dier 337. 239.

and not by others, albeit they be privies, as heirs, executors, or adminiſtrators; and in ſome caſes it is voidable by others, and not by the party himſelf; and in ſome caſes it is voidable by the party himſelf and by others. And in ſome caſes it is voidable only at ſome times; and in ſome caſes it is voidable at all times: as for examples, an infant, if he grant by fine, muſt avoid it during his minority if he live to be of full age, otherwiſe he himſelf or any other ſhall never avoid it (1). But if he grant by deed, this may be avoided at any time by himſelf, his heirs, executors, or adminiſtrators, or his guardian in his right, as the caſe is. But a lord by eſcheat cannot avoid a voidable eſtate made by his tenant being an infant. And if a woman covert do any ſuch act by deed; it may be avoided by her huſband during the coverture, or herſelf after the coverture, or her heirs, *&c.* that are privies after her death. And if a man *non ſanæ memoriæ* do any ſuch act, it may not be avoided by himſelf that is the party denying it, but it may be avoided by his heirs, *&c.* that are privies. And if tenant in tail make a voidable leaſe not warranted by the ſtatute, he may not avoid it himſelf, but his iſſue may. And if he be ward by reaſon of a tenure in *capite* or knight ſervice, the guardian of the iſſue, during his time, may avoid it. And if a corporation ſpiritual, ſole or aggregate, make leaſes not warranted by the ſtatutes, they may not avoid it themſelves, but their ſucceſſors after their death, tranſlation, or other remotion, may avoid it; or if a Biſhop make ſuch a voidable leaſe, the King, when the Biſhoprick doth come into his hands, may avoid it.

5. Who may avoid a feoffment, giſt, grant, or leaſe, that is voidable: or not: and how.

Infant.

Woman covert.

Non ſanæ memoriæ.

Tenant in tail.

Corporations.

And now we paſs to another ſort of aſſurances, that are for ſome ſpecial purpoſes, and in ſome ſpecial caſes only; wherein we ſhall firſt begin with an *Exchange*.

(1) See before in the chapter on fines, p. 7. and note 1 thereto.

CHAP. XVI.

CHAP. XVI.

Of an Exchange.

1. Exchange or eſchange. *Quid.*

AN Exchange is the mutual grant of equal intereſts, the one in exchange for the other. Or it is, where a man is ſeiſed or poſſeſſed of land in fee-ſimple, fee-tail, for life, or years, or is poſſeſſed of goods, and another is ſeiſed or poſſeſſed of other lands or poſſeſſed of other goods in the like manner, and they do exchange their lands or goods the one for the other. And in this there is a double grant; for each of them doth grant that which is his to the other.

Terms of the law tit. Exchange. Finches ley 27.

This manner of conveyance (which heretofore was very frequent) (1) is ſometimes made by word without any writing; (2) and ſometimes it is made by deed or in writing; and which way ſoever it be made, it muſt be made by this word exchange; which is a word ſo *appropriated to this thing, as the word frank-marriage is to a gift in frank-marriage; neither of which can be made or deſcribed by any circumlocution (3).

Co. ſuper Lit. 50. Perk. Sect. 253.

* P. 290.

2. The effect and fruit of it.

The fruit and effect of an exchange is, that it doth give the intereſt, and alter the property, of the things exchanged, to either party, according to the agreement. And if the exchange be of lands or tenements of any eſtate of inheritance or freehold, whether it be by word or deed, it hath a condition and a warranty in law incident and annexed to it, as a thing made by the word exchange, and *tacite* implied in every grant of exchange; a condition, to give a re-entry upon all the land given in exchange, if he be put out of all or part of the land taken in exchange; and a warranty, to enable him to vouch, and to recover over in value ſo much of his own land again given in exchange, as ſhall be recovered from him of the land taken in exchange, if he be ſued for it: ſo that upon every exchange, either party, if he be put out of or loſe by action the land he taketh in exchange, hath a double remedy againſt the other; and yet this remedy doth go only in the privity, and ſhall not go to an aſſignee (4). As if *A.* exchange land with *B.* and *B.* be put out of all or part of the land upon a title paramount by a recovery in a real action or otherwiſe, in this caſe, *B.* may either enter upon his own land again which he gave in exchange, or elſe if it be in an action brought, he may

Co. 4. 121. 15 E. 4. 3. 9 E. 4. 21. Bro. Eſchange in toto. Fitz. Eſchange in toto.

Condition.

Warranty.

Aſſignee.

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(1) This appears from the numerous precedents, inſerted in *Madox's Form. Angl.* under the title *exchange*, from page 154 to 173. but though exchanges are not now ſo frequent, yet precedents of them are properly inſerted in the latter authors in the branch of conveyancing.—ſee 1 *Horſman* 362. 3 *Wood* 243.

(2) Before the ſtatute 29 *Car.* 2. *c.* 3. for preventing frauds and perjuries.—but now by force of that ſtat. a writing is made neceſſary if the exchange is of freeholds, or of terms for years, exceeding three years.

(3) See accordingly 2 *Bl. Com.* 323.—1 *Wood* 736.—3 *Wilſ. Rep.* 491.—Five things are neceſſary to the perfection of an exchange, 1ſt. That the *eſtates* given be *equal.* Secondly, That this *word* (*excambium exchange*) *be uſed*, which is ſo individually requiſite as it cannot be ſupplied by any other word, or deſcribed by any circumlocution. Thirdly, That there be an execution by entry or claim in the life of the parties. Fourthly, That if it be of things that lie in grant, it muſt be *by deed.* Fifthly, If the lands be in ſeveral counties, there ought to be a deed *indented*, or if the thing lies in grant, albeit they be in one county, *Co. Lit.* 51. b. *Vin. Abr.* Eſchange (A. 2).

(4) Exchange importeth in the law a condition of re-entry, and a warranty voucher, and recompence of the other land that was given in exchange. An aſſignee cannot re-enter, nor vouch, but rebate; exchanger may re-enter upon an aſſignee. *Noy's Max.* 61.

vouch *A.* upon the warranty in law, and ſhall recover as much in value againſt him of the land he gave, as he hath loſt of the land he took in exchange. But if *B.* alien his land taken in exchange to *C.* and *C.* be put out of all or part of the land upon a title paramount; *C.* in this caſe, can neither enter upon the land given to *A.* in exchange upon the condition in law, nor vouch *A.* to warranty and recover over in value upon the warranty in law. And yet *A.* in this caſe ſhall have the like remedy againſt *C.* the alienee, upon the condition and warranty both, as he had againſt *B.* But if *A.* himſelf implead *C.* for the land he gave to *B.* in exchange, *C.* may make uſe of this warranty in law by way of rebutter againſt *A.* And in all theſe caſes where one of the parties is put out of all or part of the land, or out of part of the eſtate, by entry, and the other party enter upon the others land upon the condition in law, he may enter upon the whole land, and avoid the whole exchange: but if he be impleaded for a part only, or for the whole, and a part only be recovered from him; in this caſe, he ſhall recover ſo much in value of the other land only as he hath loſt, and no more: as if an exchange be of three acres for three acres, and after one of the parties is put out of one of the acres by the entry of a ſtranger; in this caſe, he may enter upon the whole three acres he had given in exchange and ſo avoid the whole exchange if he will. And if *A.* and *B.* be joint-tenants of three acres for life, and the fee-ſimple to the heirs of *A.* and *A.* exchange this land with *C.* for three acres in fee, and then die, and *B.* enter and * avoid the exchange for his life (as he may;) in this caſe, *C.* may avoid the whole exchange, and enter upon his own three acres again. So if he in reverſion diſſeiſe his tenant for life, and then exchange the land, and after the tenant for life enter; in this caſe, the other party may defeat the whole exchange. But in this caſe of an exchange of three acres for three acres, if one of the acres were gained by diſſeiſin, and the diſſeiſee bring an action and doth recover it againſt the diſſeiſor; in this caſe, if he vouch over the other party to the exchange, he ſhall recover ſo much in value only of the three acres he gave in exchange as the acre he hath loſt and no more (1).

Rebutter.

* P. 291.

See Grant numb. 4.

To the perfection of an exchange, and to make things to paſs by this kind of conveyance, theſe things are requiſite. 1. That the perſons or parties thereunto be able to give and take, and not diſabled by any ſpecial impediment. And for this it muſt be known, that ſuch perſons as may be grantors and grantees may make exchanges, and ſuch perſons as are diſabled to grant are diſabled to make exchanges.

3. How an exchange muſt be made: and what ſhall be ſaid a good exchange: or not. 1. In reſpect of the parties thereunto, and their eſtates.

Co. ſuper Lit. 51.

An exchange made between the King and a ſubject is good, albeit the King hold his land in one capacity and the ſubject in another.

Idem.

An exchange made between an infant and another, is not void but voidable only; for the infant at his full age may affirm or avoid it at his election (2).

Infant.

Bro. Exchange 9. Perk. Sect. 279.

An exchange made between a tenant in tail and another, is not void but voidable; for it is good againſt himſelf during his

Tenant in tail.

(1) See accordingly verbatim in 1 *Wood* 737.
(2) See note 3 to 13th edit. *Co. Lit.* 51. b.—and *Com. Dig.* Enfant (B. 3).

life, and his iſſue at his full age may affirm or avoid it at his election.

Non ſanæ memoriæ.

An exchange made between a man *non ſanæ memoriæ* and another, is not void but voidable; for it is good againſt him, but his heir may avoid or affirm it at his election. Bro. Exchange 9.

Huſband in right of his wife.

A man that doth hold land in fee-ſimple, fee-tail, or for life in the right of his wife, may exchange this land, and the exchange will be good as long as he and his wife do live. And he with his wife may exchange it for longer time and the exchange is good againſt him; but his wife after his death may affirm or avoid it if ſhe will. Bro. Item. Perk. Sect. 279.

Parſon.

One Parſon or Vicar may exchange his church or benefice with another, and this exchange is good. Perk. Sect. 288.

The diſſeiſor and diſſeiſee may join together and exchange the land whereof the diſſeiſin was made, with a ſtranger for other land: but if it be made out of the land, and before the entry of the diſſeiſee, it ſhall not bind the diſſeiſee, for he may avoid it. And a diſſeiſor cannot exchange the land he hath gotten by diſſeiſin with the diſſeiſee for other land; for this exchange is void, unleſs it be by indenture, or fine, that it may work by way of eſtoppel. Perk. Sect. 280. 273.

Surrender.

The leſſor and leſſee may join together and exchange the land leaſed for other land, and this is good: for it ſhall be ſaid to be the ſurrender of the leſſee to the leſſor, and the exchange of the leſſor; and therefore the leſſee (as it ſeems) ſhall have nothing to do * with the land taken in exchange. *Sed quære* of that. Perk. Sect. 279.

* P. 292.

Joint-tenants. Tenants in common.

Joint-tenants for life, the fee to one of them, may exchange their land with a ſtranger for other land, to hold in the ſame nature, and the exchange is good. But joint-tenants, tenants in common, and coparceners cannot exchange the lands they do ſo hold one with another, before they have made partition. Perk. Sect. 277. 281.

If *A.* and *B.* be joint-tenants for life, the fee to *A.* and *A.* exchange the whole land with another for other land, this is good only for his moiety as ſome have ſaid: But it ſeems notwithſtanding it is good for the whole until it be avoided by the other joint-tenant (1). Perk. Sect. 277.

2. In reſpect of the matter whereof it is made, or the nature of the thing exchanged: and of what things and eſtates an exchange may be made.

The ſecond thing required in a good exchange is, that the things exchanged be ſuch as whereof an exchange may be made. And for this it muſt be known, that an exchange may be made of things of the ſame nature, as of a temporal thing for a temporal thing, a ſpiritual thing for a ſpiritual, as a houſe for a houſe, land for land, a manor for a manor, a church for a church, rent for rent, common for common, a horſe for a horſe, one piece of plate for another, or the like: or it may be made of things of a divers nature, as of a temporal thing for a ſpiritual, of a houſe for land or rent, a chamber in a houſe for common, or for a reverſion, ſeigniory, or advowſon, of land or rent for a right of land or releaſe of right, of an advowſon for land, of a rent for a way, of a horſe for a piece of plate, of a gown for a horſe, or the like. And exchanges made of theſe things, albeit the things exchanged do lie in divers counties, are good. Alſo a ſeigniory by homage and Perk. Sect. 263. 261. 262. 266. 258. Lit. Sect. 62. Co. ſuper Lit. 51. 52.

(1) See further when an exchange ſhall be good *Com. Dig.* Exchange (A.)

fealty

Perk. Sect. 259, 260, 258. fealty or the like, which is not valuable, may be exchanged for land, rent, or any other ſuch like thing. So may a ſeigniory by divine ſervice. But a ſeigniory in frankalmoigne cannot be exchanged with any but the tenant of the land that doth hold by the tenure. And houſes, manors, lands, rents, commons, ſeigniories, reverſions, and the like, may be exchanged in fee-ſimple, fee-tail, for life, or years. So that an exchange may be of an inheritance for an inheritance, of a frank-tenement for a frank-tenement, and of chattels real for chattels real.

Perk. Sect. 244. Idem. 263. 3 E. 4. 10. 9 E. 4. 21. 9 E. 4. 21. Perk. Sect. 262. If one grant white acre in exchange for black acre lying within the ſame county, or in two counties, this is a good exchange. So if I grant a rent-charge iſſuing out of my land in exchange to *I. S.* for an acre of his land, *&c.* this is a good exchange. So if I have a rent iſſuing out of the land of *I. S.* and I grant this to *I. K.* in exchange for land or other rent; this exchange is good, when the tenant hath attorned to the grant of the rent. So if one have a rent out of my land in fee, and I have the land in fee, and I grant the land in exchange for the rent, it ſeems this is a good exchange. But if one grant me a manor or land, and I in exchange for the ſame manor or land, grant unto him a rent *de novo* iſſuing out of the ſame land or manor, this cannot take effect as an exchange. So if one releaſe his eſtovers that he hath in ſuch a wood, and deliver the releaſe in exchange for land given * to him in exchange for the ſame releaſe; this is a good exchange. [d] If there be a diſſeiſor and diſſeiſee, and the diſſeiſee releaſe his right to the diſſeiſor in exchange for other land; this is a good exchange. [e] So if the diſſeiſor of an acre of land enfeoff a ſtranger of the ſame acre of land, and the feoffee give to the diſſeiſee an acre of land in fee, in exchange for a releaſe of all his right in the acre of land of which he was diſſeiſed; this is a good exchange. [f] But if the diſſeiſee grant his right to a ſtranger that hath nothing in the land in exchange for an acre of land; this exchange is not good, neither ſhall the ſtranger take any thing by this grant. [g] If there be Lord and tenant by fealty and 12*d.* rent, and the Lord exchange the ſeigniory with the tenant for the tenancy, or *e converſo*, by deed indented; this is held by ſome to be a good exchange. [h] If I have a rent iſſuing out of the land of *I. S.* and I grant or releaſe the ſame rent to *I. S.* in exchange for other land; this is a good exchange. So if I releaſe the ſame rent unto him in exchange for a way over his ground; this is a good exchange. [i] If I be ſeiſed of lands to which *I. S.* hath a right of action, and I give to him other land for a releaſe of his right; this is a good exchange. And the ſame law is of an exchange of land, and an advowſon, by deed indented, for a releaſe of right in another advowſon to an uſurper, when his incumbent hath been in poſſeſſion of the church ſix months. [k] If two Parſons of a church make an exchange of their benefices by words of exchange, and each of them reſign his benefice into the hands of the Biſhop to the ſame intent, and the patrons preſent accordingly, and the preſentations are *per viam permutationis*; this is a good exchange. [l] If three acres of land with an advowſon appendant, be given in exchange by *T. K.* to *I. S.* for a chamber to be aſſigned by the ſaid *I. S.* at the election of *T. K.* and he aſſign two chambers, and *T. K.* chooſe and enter upon one, and *I. S.* enter upon

* P. 293.

Perk. Sect. 266. Fitz. Eſchange 16.

d Perk. Sect. 271.

e Idem. 282.

f Idem Sect. 271.

g Perk. Sect. 260.

h Perk. Sect 267.

i Perk. Sect. 268, 269.

k Perk. Sect. 257.

l Perk. Sect. 264, 265.

upon the land; this exchange is good notwithſtanding the incertainty. So if *I. S.* give his manor of *A.* to *T. K.* in exchange for his manor of *B.* or for his manor of *C.* and he enter upon one of theſe manors, and *T. K.* enter upon the manor of *A.* this exchange is good. Out of all which theſe things by the way may be obſerved. 1. That the things exchanged need not to be in *eſſe* at the time of exchange made; for a man may grant a rent *de novo* out of his land in exchange for a manor. And yet if I grant to another the manor of *A.* for the manor of *B.* which he is to have after his father's death by deſcent, it ſeems this exchange is void. 2. There needs no tranſmutation of poſſeſſion; for a releaſe of rent, eſtovers, or right of land for land is good. 3. The things exchanged need not to be of one nature, ſo as they concern lands or tenements; for land may be exchanged for rent, common, or any other inheritance which doth concern lands or tenements; or ſpiritual for temporal things, as * tithes, a tenure by divine ſervice, for land, or a temporal ſeigniory. But annuities, and ſuch like things, which charge the perſon only, and do not concern lands or tenements, or goods and chattels, cannot be exchanged for land (1).

Co. ſuper Lit. 50. Perk. Sect. 265.

* P. 294.

3. In reſpect of the manner of the making of the exchange; and where it ſhall be good without deed or not.

The third thing required in a good exchange is, that it be made in that manner and order that law doth require: wherein theſe things are to be known. 1. That if all or part of the things whereof the exchange is made do lie in ſeveral counties; or if all, or part of the things, whereof the exchange is, be ſuch as lie in grant and not in livery, albeit it be in the ſame county; in theſe caſes, the exchange muſt be made by deed indented in writing. But where the exchange is of lands, and of lands lying in the ſame county, albeit it be of any eſtate of inheritance or freehold, yet it may be by word of mouth without writing (2). And ſo alſo may it be when the things exchanged do lie in divers counties, when the exchange is made only for a term of years. And therefore if an exchange be made between *I. S.* and *T. K.* of lands lying in one and the ſame county in fee, or for life, it may be by word of mouth: but if all or part of the lands of *I. S.* lie in one county, and all or part of the lands of *T. K.* do lie in another county, the exchange muſt be made by deed indented. If an exchange be made of rent for land, and the land out of which the rent is iſſuing, and the land given in exchange for it, do both lie in one county; this exchange cannot be good without deed. So if an exchange be made of the reverſion of an acre of land for three ſhillings of rent iſſuing out of another acre of land, and both acres are in one county; this exchange muſt be made by deed indented, or it will not be good. So if an exchange be made of an acre of land, and a rent out of another acre, for another acre of land and common for three beaſts, and all is in one and the ſame county, this exchange muſt be by deed indented, or it will not be good. But if I be ſeiſed of a manor to which I have common appendant or appurtenant, and *T. K.* is ſeiſed of another manor to which he hath a villain regar-

Perk. Sect. 244. Co. ſuper Lit. 51, 52. Lit. Sect. 62. Co. 9. 14. Perk. Sect. 247, 248, 249, 250. 246.

(1) Accordingly 1 *Wood* 740.—*Lilly's Conv.* 138.—and ſee further of what things an exchange may be, in *Vin. Abr.* Eſchange (D.)

(2) See before *page* 288 *note* 2, as to the ſtat. 29 *Car.* 2. *c.* 3. for prevention of frauds and perjuries.

dant

dant, and both the manors are in one county, an exchange may be made of theſe manors by word of mouth without writing, and the common and villain will paſs as incidents well enough. And yet if *I. S.* hath an office whereunto land doth belong, and *T. K.* hath rent iſſuing out of the land of a ſtranger, and all the land is in one county, and the office is to be uſed and occupied in the ſame county; if theſe things be exchanged, it muſt be by deed indented. 2. The word [eſchange] or [exchange] muſt be had and uſed between the parties in the making of the exchange. As, I grant to you white acre, to have and to hold to you and your heirs in exchange for black acre; and in conſideration hereof you grant to me and my heirs black acre in exchange for * white acre: for this word is ſo individually requiſite, as it cannot be ſupplied by any other word; neither will any averment, that it was in exchange, help in this caſe (1). And therefore if *A.* by deed indented give to *B.* an acre of land in fee-ſimple, or for life, and by the ſame deed *B.* doth give to *A.* another acre of land in the ſame manner, this cannot enure as an exchange; and therefore if there was no livery of ſeiſin, ſo as it may take effect by way of grant, it is utterly void. But by this means lands may be granted from one to another, for there needs no livery of ſeiſin. So if an exchange be made by words between two, of lands in one county, and before their entry indentures are made between them of the ſame lands without words of exchange, and no livery of ſeiſin is made; this ſhall not paſs by way of exchange (2). And yet it hath been held by ſome that *Permutatio*, or ſome other word of like effect, may ſupply this word exchange. (3). 3. If any rent, reverſion, ſeigniory, or the like be granted by either party, that then the tenant do attorn to the grant, for attornment is requiſite in this caſe. And yet in the caſe of the grant of land in poſſeſſion in exchange, no livery of ſeiſin is needful. Neither is it needful that either party to the exchange come to the thing given to him in exchange by the ſame means and manner of aſſurance: for if leſſee for life of one acre give another acre to his leſſor in tail in exchange for a releaſe from him of that acre, to have and to hold in tail in like manner, this is a good exchange.

Co. ſuper Lit. 50, 51. Perk. Sect. 252, 254. 9 E. 4. 21. Fitz. Exchange 12.

* P. 295.

Livery of ſeiſin.

Perk. Sect. 259. 263. 289. 276.

Attornments.

Livery of ſeiſin.

Perk. Sect. 265.

An exchange may be made to take effect in *futuro*, as well as in *preſenti*; for if an exchange be made between me and *T. K.* that after the feaſt of *Eaſter T. K.* ſhall have my manor of *Dale* in exchange for his manor of *Sale*, this is a good exchange.

19 H. 6. 27. Perk. Sect. 275.

If an exchange be made in writing of land, and it doth limit and expreſs no eſtate that either party ſhall have in the thing exchanged, yet this is a good exchange. But if an eſtate for life be limited expreſsly to one, and no expreſs eſtate is limited to the other; this is not a good exchange, as ſhall be ſhewed in the next place.

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(1) See before in page 288, and note 3 thereto.—In exchanges of land the word *exchange* is neceſſary in the conveyance, becauſe it imports a ſpecial warranty, in reſpect of the mutual conſideration of the lands exchanged: 'tis likewiſe neceſſary that the eſtates of both parties be equal in title, as if one hath an eſtate in fee, the other muſt have the like eſtate; but 'tis not neceſſary that their eſtates ſhould be equal in value. 3 *Salk.* 158.

(2) An exchange in the ſtrict legal ſenſe of the word cannot be between three; the principles of it not being applicable to more than two *diſtinct* contracting parties, for want of the mutuality and reciprocity, on which it's operation ſo entirely depends.—See note 1. to *Co. Lit.* 50. b. 13th edit.—and 2 *Wilſ. Rep. pt.* 3. *p.* 496.

(3) In an exchange of eccleſiaſtical preferment. See *ante* 291. *&c. poſt* 295. and note 3 thereto.

4. In reſpect of the quality or equality of the eſtates or intereſts exchanged.

The fourth thing required in a good exchange is equality of eſtate, *viz.* that either party have the like kind of eſtate of the thing exchanged; ſo that if one have an eſtate in fee-ſimple, the other have ſo likewiſe, and ſo for other eſtates. For if the one grant that the other ſhall have his land in fee-ſimple for the land which he hath of the other in fee-tail; or that the one ſhall have in the one land fee-tail, and the other in the other land but for term of life; or that the one ſhall have in the one land fee-tail general, and the other in the other land fee-tail ſpecial; or that the one ſhall have in the one land for life, and the other in the other * land but for years; theſe exchanges are void and cannot take effect as exchanges. [m] And therefore if the Lord releaſe to his tenant his ſervices in tail in exchange for other lands given to the Lord in exchange in tail alſo; this exchange is void; for by this releaſe made by the Lord the ſervices are gone for ever. [n] So if tenant for his own life exchange with him that is tenant for life of another; this is not a good exchange. (And by the ſame reaſon it ſhould ſeem, if leſſee for twenty years of his land, exchange with another for other land for forty years, that this ſhould not be a good exchange.) [o] But if leſſee for life be of an acre of land, and he give another acre of land to his leſſor in fee-tail in exchange for a releaſe of all his right in the acre that he holdeth for term of his life, to hold to him and the heirs of his body engendred; this is a good exchange. [p] Or if tenant for his own life exchange with him that is tenant in tail after poſſibility of iſſue extinct; this exchange is good. [q] And yet if an eſtate for life be expreſſed to the one party upon the exchange, and no eſtate is expreſſed to the other party; it is ſaid that this exchange is not good; and yet where no eſtate is expreſſed, the party ſhall have an eſtate for his own life.

Fitz. Exchange 15. Lit. Sect. 64, 65. Co. ſuper Lit. 50, 51. Perk. Sect. 276.

* P. 296.

m] Perk. Sect. 283.

n] Perk. Sect. 275. Finches ley 27.

o] Perk. Sect. 276.

p] Co. 11. 80.

q] Perk. Sect. 275. 19 H. 6. 27.

Huſband and wife. Tenant in tail.

But in theſe caſes it is not neceſſary that the parties to the exchange be ſeiſed of an equal eſtate at the time of the exchange made; for if tenant in tail or huſband in right of his wife exchange their land in fee-ſimple with another for lands he hath in fee-ſimple; this is a good exchange, until it be avoided by the iſſue or the wife. [r] Neither is it neceſſary that both eſtates be in poſſeſſion; for one may grant an acre in poſſeſſion in exchange for an acre in reverſion, and this exchange is good. [s] Neither is it neceſſary that there be an equality in the value or quantity of the lands exchanged: for if the land of one of the parties be worth one hundred pounds and the land of the other but ten pounds; or if the land of one of the parties be one hundred acres and the land of the other but ten acres; if the eſtates given be equal, the exchange is good. [t] Neither is equality in the quality or manner of the eſtate requiſite. For if two joint-tenants be in fee of an acre of land, and they grant that acre to another in exchange for other lands, to have and to hold a moiety to one of them and his heirs, and a moiety to the other and his heirs, which is an eſtate in common; or if two men give lands in exchange to *A.* and his heirs, for lands from *A.* to them two and their heirs, albeit the one party hath a joint eſtate and the other a ſole eſtate, yet the exchange is good. The like law is if the land of one of the parties be of a defeaſible title, and the land of the other of

Co ſuper Lit. 51. Perk. Sect. 289. Lit. Sect. 65. Perk. Sect. 280, 281.

r] Idem.

s] Idem.

t] Idem.

an

an undefeasible title; this exchange is good till it be avoided (1).

Co. ſuper Lit. 50. 51. Co. 1. 98. 105. Perk. Sect. 284. 286. 292. 289.

* The fifth and laſt thing required in a good exchange is, that there be an execution and perfection of the exchange by entry or claim in the life-time of the parties, *viz.* that both the parties to the ſame exchange do enter into the things taken in exchange, if they be ſuch things as they may enter into; for until the exchange be executed by entry, or the like, the parties thereunto have no freehold in deed or in law in the things exchanged, albeit the ſame things do lie in one county: and if either of the parties die before he enter into the lands by him taken in exchange; hereby the whole exchange is become void, if his heir will; but if one of the parties enter, he ſhall not firſt begin to avoid the exchange (2). But if the parties enter at any time during their lives it is ſufficient, unleſs the poſſeſſion be before deveſted by an elder title, as by entry for a condition broken, entry by a diſſeiſee, or his heir, or the like, and not reveſted again before the entry. As if an exchange be had between two of land, and before their entry by force of the exchange they are, or one of them is, diſſeiſed of the land exchanged, and the diſſeiſor die ſeiſed thereof, and then they enter according to the exchange, and put out the heir of the diſſeiſor, this ſhall not be ſaid to be an execution of the exchange; but if the diſſeiſee have recovered the ſame land againſt the heir of the diſſeiſor by writ of entry, and have execution, then he may execute the exchange by entry. And in caſe where a reverſion, rent, or ſeigniory, is granted in exchange, it muſt be perfected and executed by the attornment of the tenant in the life-time of the parties, otherwiſe the exchange is not good; but in this caſe, after attornment is made, it ſeems the exchange is perfect without any entry or claim.

* P. 297.

5. In reſpect of the execution of it.

Perk. Sect. 258.

If two Parſons exchange their churches, and reſign them into the Biſhop's hands, this is not a perfect exchange until they be inducted; and therefore if either of them die before they be both inducted, the exchange is void (3).

Perk. Sect. 255. 256. Fitz. Exchange 14. Perk. Sect. 272.

Where a deed ſhall take effect as an exchange, there muſt be all the conditions before mentioned in the caſe. And yet note,

4. When a deed ſhall take effect as an exchange or not.

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(1) See accordingly in 1 *Wood* 742.—*Lilly's Pract. Conv.* 139.—and more amply of what eſtates exchanges may be made, and what eſtate the parties to the exchange ought to have, in *Vin. Abr.* Eſchange (F.) (G.)—*Com. Dig.* Eſtates) (A. 2.)

(2) If the exchangers do not enter in their lives, the exchange is void, for *it muſt be executed in the ſame parties that made the exchange.* *Br. Abr.* Eſchange *pl.* 6. See further at what time an exchange ought to be executed, in *Vin. Abr.* Eſchange (K).

(3) If two Parſons permute their churches, it ſhall be executed by preſentation of their patrons, and their admiſſion, inſtitution, and induction; and until *induction* the execution is not compleat. In the Engliſh tranſlation of *Perk. Sect.* 257. (cited in the margin above) it is ſaid "if two Parſons exchange their benefices, "by the word *Permutatio*, and *either* of them reſign his benefice into the hands of the Biſhop to the ſame pur- "poſe: and the patrons preſent them accordingly, and the preſentments make mention *per viam permuta-* "*tionis*, this is a good exchange if *either* of them be inducted living the other, *&c.*"——In *Perk. Sect.* 288. It is ſaid "if two Parſons exchange their benefices, and reſign them into the hands of the ordinary to the "ſame purpoſe: and the patrons make preſentments accordingly, and one of the Parſons is admitted, inſtitut- "ed, and inducted; and the other Parſon is admitted and inſtituted, but dieth before induction; the other "Parſon ſhall not keep the benefice in which he is inducted; for the exchange is not perfected, becauſe it is "not executed."— —Theſe two ſections of that excellent book on the Laws of England by Mr. *Perkins* are inſerted in *Vin. Abr.* Eſchange (L.) in ſuch a manner, as to impreſs the readers mind with an idea, that thoſe ſections are contradictory to each other.—Mr. *Viners* notion ſeems to have ariſen from the word *either* (in the *Engliſh tranſlation* of the 257th ſect. of *Perkins*) being uſed in two places: but if the word *each* is ſubſtituted for the word *either*, as in propriety it ought to be (the word in *Perkins* being *cheſcun*) it is preſumed the ſeeming contradiction will be clearly obviated, and the text above ſupported.—See further on this point in *Gibſ. Cod.* 868. 2 *Co.* 74.—*Hob.* 152.—*Wood's* Inſt. 283.—2 *Burn's* Ecc. Law, *Tit.* Exchange.

that

that where one thing is granted for another in the nature of an exchange, and for ſome of the cauſes aforeſaid, the things cannot paſs by way of exchange, there they may paſs notwithſtanding by way of grant; and the deed may take effect to other purpoſes, albeit it may not enure and take effect as an exchange. And therefore if two be ſeiſed of ſeveral acres of land, and the one of them by deed doth give his acre to the other, and the other his acre to him without any word of exchange, and each of them doth make livery of ſeiſin to the other; in this caſe, albeit the acres will not paſs by way of exchange, yet will they paſs by way of grant. And in this caſe if no livery of ſeiſin be made, either of them ſhall hold the lands granted at will only. And in like manner it is, if two * agree to exchange land, and after each of them levy a fine, or make a feoffment of the land, to the other; by this the land will paſs each to the other, but not by way of exchange. So if *A.* and *B.* his wife, and *C.* and *D.* his wife, agree to exchange lands, and *A.* and *B.* enter into the land they are to have in exchange, and then they do make a feoffment of their own land unto *C.* and his father, and not to *C.* and *D.* his wife; this ſhall not enure as an exchange, and therefore *C.* and *D.* may enter upon their own land again; but the feoffment is good. And if one aſſign a woman her dower in exchange for land; this ſhall not take effect as an exchange, but it ſhall enure to be a good aſſignment of dower.

* P. 298.

5. How an exchange ſhall be conſtrued and taken.

If two do exchange land by deed, and limit no eſtates, this ſhall be taken for eſtates for life, and the exchange is good; but if an expreſs eſtate be limited to one, and no expreſs eſtate to the other, it is ſaid this is not good, and that conſtruction of law will not help it. 19 H. 6. 27. Perk. Sect. 275.

If an exchange be made between two men of two acres of land by deed, and in the *Habendum* it is ſet down that each of them ſhall have the acres given in exchange, with divers other acres not expreſſed in the premiſſes, this addition ſhall be taken as ſurpluſage, and the exchange ſhall be good for the two acres. See more in *expoſition of deeds*. Perk. Sect. 251.

6. Where an exchange ſhall be determined, or the nature of it changed by matter *ex poſt facto:* and how: and where not.

If after an exchange is made, before or after the parties enter, all, or part of the land given to either party be recovered from him upon an elder title, as by an entry upon a condition broken, alienation in mortmain, or upon a diſſeiſin; in theſe caſes if that party enter again upon his own land which he gave in exchange (as he may) hereby the whole exchange is determined (1). But if after the exchange is perfect, one of the parties do enter upon the land he doth give in exchange, this doth not make void the exchange; neither may the other party hereupon enter upon the land he doth give in exchange; but he may have an aſſiſe, or an action of treſpaſs againſt the other. And yet if an exchange be of a common for a way, or a rent, or the like, if the one party deny the common, it hath been ſaid the other party may deny the way or the rent. *Sed quære.* Perk. Sect. 286. Co. 4. 122. Perk. Sect. 299 Bro. Exchange 12. Perk. Sect. 299. Bro. Eſchange 8. Perk. Sect. 297.

If an exchange be made between two of a manor, whereof the one half is in tail, and the other half is in fee-

(1) And if parcel of the *eſtate* is defeated, the exchange is as totally and utterly defeated, as if parcel of the *land* given in exchange were defeated, per *cur. Cro. Eliz.* 902. See further what act or thing will defeat an exchange, in *Vin. Abr.* Eſchange (N.)——It is not clear in the law of exchanges, if there is an alienation by one of the parties, and there is an eviction, whether the heir at law or the alienee ſhould enter.—per Ld. *Hardwick* in *Coventry* v. *Coventry* 2 *Atk.* 369.

ſimple,

Bro. Exchange 8. Perk. Sect. 279.

ſimple, and the tenant in tail that made the exchange die, and his iſſue diſagree to it, ſo that the exchange of the entailed land is become void; this doth determine the whole exchange: for when an exchange becometh void in part, it becometh void in all; and until it be avoided, it is good for all. As if one be ſeiſed of white acre, and he exchange white acre and black acre (which is none of his) with another for two other acres; this ſhall continue for a good exchange, and not be avoided, until he that hath right to black acre doth evict him that hath it in exchange.

Co. 4. 122. Perk. Sect. 296. 294. 290. 298.

* If an exchange be made by tenant in tail, and his iſſue after his death waive the poſſeſſion of all or part of the land taken in exchange, and diſagree to the exchange, hereby the whole exchange is determined. So if the wife after the huſband's death, the infant at his full age, or the heir of him that is *non ſanæ memoriæ*, diſagree to the exchange of the huſband, the infant, or him that is *non ſanæ memoriæ*; hereby the whole exchange is determined, and no ſubſequent agreement can make it good again. * P. 299.

35 E. 4. 3.

If two do make an exchange by word of mouth, and after, before either of them enter, they make indentures of the lands exchanged, and grant the ſame from one to another; it ſeems hereby the nature of the exchange is altered, and the exchange determined.

7. Who may take advantage of a void or voidable exchange: or not: and when.

Perk. ſect. 285. Co. 1. 105. Dier 285. Perk. ſect. 290. 294. 298. Co. 1. 98.

The parties themſelves, and all privies and ſtrangers for the moſt part, may take advantage of ſuch exchanges as are void for the defects before named: but when the exchange is only voidable, *contrà*. And therefore when an exchange is made by an infant; the infant himſelf at his full age, or his heir, and none other, may avoid it. And when an exchange is made by a tenant in tail, the iſſue in tail after the death of his anceſtor, and none other, may avoid it. And when an exchange is made by the huſband, or huſband and wife, of the wife's land, the wife after the huſband's death, or heir of the wife after her death, and none other, may avoid it. And when an exchange is made by a man *non ſanæ memoriæ*, his heir after his death, and none other, may avoid it. But in all theſe caſes of infant, tenant in tail, woman covert, and a man *non ſanæ memoriæ*, and where lands are recovered by an elder title, the other party may not enter and avoid the exchange, until the infant, iſſue in tail, woman, or heir of him that is *non ſanæ memoriæ*, or him that doth loſe the land by an elder title, doth firſt enter.

Infant.

Tenant in tail.

Huſband and wife.

Non ſanæ memoriæ.

8. Where an exchange voidable at firſt, doth become good by matter *ex poſt facto*: or not.

Co. ſuper Lit. 51. 12 H. 4. 11. Perk. Sect. 290. 294. Fitz. Exchange 13. Perk. ſect. 291. 279. 293. 298.

If an infant exchange lands, and after at his full age occupy the lands taken in exchange for his own lands; hereby the exchange is made good. So if tenant in tail exchange his intailed lands with another, and after his death the iſſue occupy the lands taken in exchange by his anceſtor; hereby the exchange is made good for the life of the iſſue in tail. So if the huſband and wife exchange the lands of the wife for other land, and ſhe, after her huſband's death, agree to it, and enter into and agree to the lands taken in exchange; hereby the exchange is made good: but if the huſband alone make an exchange of his wife's land, and ſhe after his death agree to this, and enter into the land; it ſeems this will not make the exchange good. And if a man, ſeiſed of land in right of his wife in fee, thereof infeoff a ſtranger, and take an

Tenant in tail.

Huſband and wife.

eſtate back again to him and his wife, and a third perſon, in fee, and they three join in exchange of the ſame land in fee for other lands to a ſtranger in fee, and the exchange is executed, and the huſband dieth, and ſhe doth occupy * the land taken in exchange with the other third perſon; hereby the exchange is made good. If a man *non ſanæ memoriæ* make an exchange, and his heir, after his death, enter into the land taken by his anceſtor in exchange, and agree to the exchange; hereby the exchange is made good. And in all theſe caſes when the exchange is once by agreement made good, it can never by any ſubſequent diſagreement be afterwards made void.

* P. 300.

And now from hence we come to a *ſurrender*; a ſpecial way or means for the giving or transferring of ſomething to another, that hath already ſome intereſt in the ſame thing.

CHAP. XVII.

CHAP. XVII.

Of a Surrender.

Co. ſuper Lit. 337.

A Surrender properly taken, is the yielding or delivering up of lands or tenements, and the eſtate a man hath therein, unto another that hath a higher and greater eſtate in the ſame lands or tenements. But it is ſometimes improperly applied to other things. He that doth ſurrender is called the ſurrenderor, and he to whom it is made is called the ſurrenderee. 1. Surrender, *Quid.* Surrenderor. Surrenderee.

Co. ſuper Lit. 337. 338. Co. 6. 69. Plow. 106. 107. Weſt. Symb. 1. part. lib. 2. cap. 460.

And there be three kinds of ſurrender, *viz.* 1. A ſurrender properly taken at the common law. 2. A ſurrender by cuſtom of lands holden by cuſtom, or of cuſtomary eſtates, whereof we ſpeak not here (1). 3. A ſurrender improperly taken, as of a deed, or grant of a rent-charge, of a patent, and of land in fee-ſimple to the King. The ſurrender properly taken is of two ſorts: 1. Expreſs or in deed, which is when it is done by apt words, and the expreſs agreement of the parties. 2. In law or implied, which is when it is wrought by conſequence and operation of law; or when the law doth interpret or enure ſomething done to another intent, to make a ſurrender of it. And in the firſt caſe, it is ſometimes by word only, and ſometimes by writing (2). And when it is by writing, it is ſaid to be an inſtrument teſtifying by apt words, that the particular tenant of the lands or tenements for life or years, doth conſent and agree, that he which hath the next and immediate remainder or reverſion thereof, ſhall alſo have the particular eſtate of the ſame in poſſeſſion, and that he yieldeth the ſame unto him. 2. *Quotuplex.*

Co. ſuper Lit. 338. Co. 1. 96. Bro. ſurrender 47. Perk. Sect. 591.

The fruit and effect of a ſurrender is, that it doth paſs the eſtate of the ſurrenderor to the ſurrenderee, and that hereupon the eſtate of the ſurrenderor is drowned, and extinct in the eſtate of the ſurrenderee; and yet not ſo, but that to ſome purpoſes it ſhall be * ſaid to have continuance ſtill. And therefore if tenant for life grant a rent-charge, and after doth ſurrender his land; in this caſe, the rent-charge ſhall continue notwithſtanding the ſurrender. So if leſſee for life make a leaſe for years rendring rent, and the leſſee for life ſurrender his eſtate; in this caſe, albeit the primitive eſtate for life be yielded up, yet the derivative eſtate for years ſhall continue notwithſtanding; 3. The effect of it. * P. 301. Extinguiſhment.

(1) A ſurrender of copyhold lands (where by a ſubſequent admittance the grant is to receive its perfection and confirmation,) is, according to my Lord *Coke*, rather a manifeſting of the grantor's intention, than a paſſing away of any intereſt in the poſſeſſion; for till admittance the lord taketh notice of the grantor as tenant, and he ſhall receive the profits of the land to his own uſe, and ſhall diſcharge all ſervices due to the Lord: but yet the intereſt is in him only *ſecundum quid*, and not abſolutely; for he cannot paſs away the land to another, or make it ſubject to any other incumbrance than it was ſubject to at the time of the ſurrender; neither in the grantee is any manner of intereſt inveſted before admittance; for if he enter, he is a treſpaſſer, and puniſhable in treſpaſs; and if he ſurrender to the uſe of another, the ſurrender is meerly void, and by no matter *ex poſt facto* can be confirmed.—*Co. Comp. Cop.* 87. See further with reſpect to a ſurrender of copyhold lands, as part of the general doctrine of copyhold, in *Co. Lit.* 59.—*Gilb. Ten.* 157.—2 *Bl. Com.* 147.—*Wright's Ten.* 215.—and the title *copyhold* in the ſeveral abridgments, *&c.*

(2) By the ſtatute 29 *Ch.* 2. *c.* 3. § 3. no leaſes, *&c.* either of freehold, or term of years, or any uncertain intereſt, not being copyhold or cuſtomary intereſt, ſhall be *ſurrendered*, unleſs it be by deed or note in writing, ſigned by the party *ſurrendering* the ſame or their agents thereunto lawfully authorized by writing, or by act and operation of law.—See further in *Gilb. Eq. Rep.* 236.—*Vin. Abr.* Surrender (L.)

but

Covenant.

but the ſurrenderee ſhall not have the rent reſerved upon the leaſe for years. So if leſſee for life, or years, break a covenant with his leſſor, and after ſurrender his eſtate to him, his breach of covenant is not hereby ſalved; for the leſſor may have an action of covenant ſtill notwithſtanding the ſurrender. And if one ſeiſed of land, grant a rent out of it in fee, and this rent is extended on a ſtatute, or granted for leſs time to another, and then the grantee doth ſurrender the deed of the grant of the rent to the tenant of the land; in this caſe, the rent ſhall continue as to him that hath execution, and to the grantee for the leſs time. And if one make a leaſe for years rendring rent, and the leſſee ſurrender his eſtate to the leſſor; hereby the rent is extinct: but if the leſſor grant the rent to a ſtranger before the ſurrender, *contrà*. And if one leaſe for years, and the leſſee let parcel of his term to his leſſor rendring rent, and after the leſſee ſurrender his whole eſtate; in this caſe, it ſeems the rent is determined (1). Co. 8. 145. 7. 39. Bro. ſur. 42.

4. What ſhall be ſaid a ſurrender in law of lands: and by what means an eſtate ſhall be ſurrendred in law: or not.

By acceptance and taking of a new eſtate.

If leſſee for life, or years, take a new leaſe of him in reverſion, of the ſame thing in particular contained in the former leaſe for life or years; this is a ſurrender in law of the firſt leaſe. As if leſſee for his own life, or another's life, in poſſeſſion or reverſion, take a new leaſe for years; or a leſſee for forty years takes a new leaſe for fifty years; the firſt leaſe in both theſe caſes is ſurrendred. And this rule holdeth, albeit the ſecond leaſe be for a leſs time than the firſt, as if leſſee for life accept a leaſe for years, or leſſee for twenty years accept a leaſe for two years. And albeit the ſecond leaſe be voidable, as being made upon condition, as if leſſee for twenty years take a new leaſe for twenty years, upon condition that if ſuch a thing happen the ſecond leaſe ſhall be void, and the thing do after happen; in this caſe, both theſe leaſes are become void: as where the leſſor doth grant the reverſion to the leſſee upon condition, and after, the condition is broken. Or if the ſecond leaſe be made by tenant in tail, or the like: as if a man make a leaſe for years of land, and then make a feoffment to another of the land, and then take back an eſtate to him and his wife of the land, and then make a new leaſe to the leſſee for ten years; this is a ſurrender in law of the firſt leaſe; but if the ſecond leaſe be merely void, then it is otherwiſe. And therefore if the leſſor do, by words of covenant only, promiſe to his leſſee that he ſhall have a new leaſe, and do never actually make it; this is no ſurrender in law. And this rule as it ſeems * holdeth alſo, albeit the ſecond leaſe be to the leſſee and a ſtranger, or to the leſſee and his wife; and albeit the ſecond leaſe be by word only, and the firſt leaſe be by deed, if ſo be the thing granted by the leaſe be ſuch a thing as may paſs by word without writing; and albeit the ſecond leaſe be in another right, as if the huſband have a leaſe for years in the right of his wife, and then take a new leaſe to him-

14 H. 8. 15. Plow. 194. Dier 28. Co. 10. 67. Perk. Sect. 617. Co. 5. 11. Fitz. ſurrender 3. Co. ſuper Lit. 218. 37 H. 6. 17. Dier 140. 141. Dier 272. a Dier 178. 177. Co. 5. 54. 55. Kelw. 70. Dier 140. 141. Dier 178.

* P. 302.

(1) A ſurrender immediately deveſts the eſtate out of the ſurrenderor, and veſts it in the ſurrenderee; for it is a conveyance at common law, to the perfection of which no other act is requiſite, but the bare grant; and though it be true, that every grant is a contract, and there muſt be *actus contra actum*, or a mutual conſent; yet that conſent is implied: a gift imports a benefit, and an *aſſumpſit* to take a benefit may be well preſumed; and there is the ſame reaſon why a ſurrender ſhould veſt the eſtate before notice or agreement, as why a grant of goods ſhould veſt a property, or ſealing of a bond to another in his abſence, ſhould be the obligee's bond immediately without notice.—*per cur.* 2 *Salk.* 618. See the caſes there cited in the margin in the 5th edition;—and more amply as to the nature force and effect of a ſurrender, in 2 *Bl. Com.* 326. 7th edition—*Vin. Abr.* Surrender (A. 2.)—*Wood's Inſt.* 284.—*Com. Dig.* Surrender (A.)

Paſc. 40 El. Co. ſuper Lit. 338. Co. 6. 69. 10. 53. 67. 5. 11. Dier 280. Dier 93. 112.

ſelf in his own name; and albeit the firſt leaſe be to begin preſently, and the ſecond be to begin at a day to come, or *è converſo*; and albeit there be a mean eſtate between, as if land be let to *A.* for years, and after let to *B.* for years, to begin after the firſt term, and the aſſignee of *A.* doth take a new leaſe: So if one demiſe land for ten years to one, and after demiſe it for ten years to another, to begin at *Michaelmas*, and after the firſt leſſee accept a new leaſe. For in all theſe caſes, there is a ſurrender in law of the firſt leaſes.

Dier 46. Co. 2. 60.

And if there be two leſſees for life, or years, and one of them take a new leaſe for years, this is a ſurrender of his moiety; whereby it doth appear, that a ſurrender in law may be made of ſome eſtates which cannot be ſurrendered by a ſurrender in fait; for *fortior eſt diſpoſitio legis quam hominis.*

Co. 6. 69. 10. 67.

And hence it is, that a corporation aggregate may make a ſurrender in law without deed, although it cannot make an expreſs ſurrender without deed.

Perk. Sect. 608. Bro. Surrender 48. Trin. 5 Jac.

But if the leſſee do only licence the leſſor to make a feoffment, and to give livery of ſeiſin for him; or to give livery of ſeiſin for him as at his attorney; or do licence him to enter into the land and no more; neither of theſe things ſhall be ſaid to be a ſurrender in law.

Co. 6. 69. Adjudged.

So if the ſecond leaſe be made of another, and not of the ſame thing whereof the firſt leaſe is made, as where the firſt leaſe is of the land, and the ſecond is made of a rent, or other profit to be taken out of the land; or the firſt is of a manor, and the ſecond of the Bailiwick or Stewardſhip of the manor; or the firſt is of a park, and the ſecond is of the keeperſhip of the park; in theſe caſes, there is no ſurrender of the firſt leaſe. Alſo if the ſecond leaſe be not a good leaſe, perhaps it ſhall not be conſtrued a ſurrender. See *Co.* 2. *Lane's* caſe 17 (1).

Trin. 5 Jac. Sir Jo. Chamberlane's caſe. See Dier 200. Co. 5. 11.

But if the firſt leaſe be of the land itſelf, and the ſecond leaſe is of the veſture of the ſame land, this is held to be a ſurrender of the firſt leaſe. So if the ſecond leaſe be not to begin until the firſt leaſe end, the taking of this ſecond leaſe is no ſurrender of the firſt leaſe. So it hath been ſaid, if one make a leaſe of black acre in *Dale*, and the leſſee accept a ſecond leaſe of all the lands of the leſſor in *Dale*, in general words, and the leſſor that doth make the leaſe, have divers other lands there beſides this acre, that this is no ſurrender of the firſt leaſe. *Sed quære* of this, for others do much doubt it.

Per Curiam B. R. 9 Jac.

So if one enter into land, and make a leaſe for the trial of the title only, and after the leſſor (he and the leſſee being both out of poſſeſſion) * make another leaſe of the ſame thing to the leſſee; it ſeems this is no ſurrender of the firſt leaſe; but if the leſſor enter before he make the leaſe, *contra* (2).

See Perk. in his chap. of Surrender in toto. Bro. Surrender in toto. Fitz. Surrender in toto. Co. ſuper Lit. 338.

To make a good ſurrender in deed of lands, and to make them paſs by ſuch a ſurrender, theſe things are firſt of all required. 1. That the ſurrenderor be a perſon able to grant and make, and the ſurrenderee a perſon capable and able to take and receive a ſurrender, and that they both have ſuch eſtates as

* P. 303.

5. What ſhall be ſaid a ſurrender in deed of land: and when they ſhall be ſaid to paſs by ſuch ſurrender; or not.

1. In reſpect of the perſons between whom it is made, and their eſtate and poſſeſſion.

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(1) The acceptance of a ſecond *good* leaſe (as hath been obſerved before) will operate as a ſurrender of the former; but the reaſon doth not hold in the caſe of accepting a new *void* leaſe, or one that the leſſee cannot enjoy.—There is no inconſiſtency in the acceptance of a new good leaſe being a ſurrender of the former, but the accepting a new void leaſe cannot ſhew an intention to ſurrender the other, for a void contract for a thing that a man can not enjoy, can not in common ſenſe and reaſon, imply an agreement to give up a former contract.—4 *Burr.* 2213.

(2) See accordingly *verbatim*, 1 *Wood* 745. 6.—and further in *Com. Dig.* Surrender (I.) *Wood's Inſt.* 285. *Lilly's Prac. Conv.* 282.

as are capable of a ſurrender. And for this purpoſe, 1. That the ſurrenderor have an eſtate in poſſeſſion of the thing ſurrendred at the time of the ſurrender made, and not a bare right thereunto only. 2. That the ſurrender be to him that hath the next immediate eſtate in remainder or reverſion, and that there be no intervenient eſtate coming between. 3. That there be a privity of eſtate between the ſurrenderor and the ſurrenderee. 4. That the ſurrenderee have a higher and greater eſtate in the thing ſurrendered, than the ſurrenderor hath, ſo that the eſtate of the ſurrendror may be drowned therein. 5. That he have the eſtate in his own right, and not in the right of his wife, *&c.* 6. And that he be ſole ſeiſed of this eſtate in remainder or reverſion, and not in joint-tenancy. As for examples, infants, women covert, mad and lunatick men, and all ſuch like perſons, as are diſabled to grant, are diſabled to make a ſurrender; and none but ſuch as may grant their land, may ſurrender their land. A corporation aggregate of many cannot make an expreſs ſurrender without a deed, but it may make ſuch a ſurrender by deed. And ſuch perſons as are diſabled to take by a grant are diſabled to take by a ſurrender, and ſuch as may be grantees, may be ſurrenderees; and therefore a ſurrender made to an infant is good (1). If the huſband have a leaſe or eſtate for years, in the right of his wife, he alone, or he and his wife together, may ſurrender this; but if the huſband have an eſtate for life in the right of his wife, being tenant in dower or otherwiſe, and he alone, or he and ſhe together, ſurrender this; this ſurrender is good only during the life of the huſband, except it be made by fine. One executor may ſurrender an eſtate or leaſe for years which the executors have in the right of their teſtator. If there be two joint-tenants and one of them have the particular eſtate, and the other the fee-ſimple; as where an eſtate is limited to two and the heirs of one of them, and he that hath the eſtate for life doth alien his part to a ſtranger; in this caſe, the alienee may ſurrender to the other joint-tenant: ſo if there be three joint-tenants for life, and the fee-ſimple is limited to the heirs of one of them; and one of the joint-tenants for life doth releaſe to the other, and he, to whom this releaſe is made, doth ſurrender to him that hath the fee-ſimple; this is a good ſurrender of a third part. But otherwiſe one joint-tenant cannot ſurrender to another joint-tenant, albeit he be tenant for life * which doth make, and he tenant in fee-ſimple that doth take the ſurrender. A leſſee for life or years, may ſurrender to him that is next in remainder in fee-ſimple, or fee-tail, or to him in reverſion in fee, and this is a good ſurrender; and a ſurrender, as it ſeems, may be made to the grantee of the reverſion before attornment, ſo as attornment be afterwards made. And in caſe of the ſurrender of an eſtate for life, there needs no livery of ſeiſin as in caſe of the grant of an eſtate for life. A leſſee for years of a term to begin at a day to come, cannot ſurrender it by an actual ſurrender before the day the term begin, as he may by a ſurrender in law. If leſſee for life be diſſeiſed, or leſſee for years be ouſted, and before his entry or the getting of the poſſeſſion again, he ſurrender his eſtate to

Co. 10. 67.

Huſband and wife. Perk. ſect. 613. 612. Bro. ſurrender 44.

Executors 21 H. 7. 25.

Joint-tenants. Perk. ſect. 586, 587. Fitz. Sur. 2.

* P. 304.

Perk. ſect. 584. Co. ſuper Lit. 338. Perk. ſect. 600. Bro. Sur. 4.

Livery of ſeiſin. Dier 2 et. 358. 280.

Perk ſect. 601, 602. 4 H. 7. 10. Co. 6. 69. Perk. ſect. 600, 601. 602, 603.

(1) See accordingly 2 *Vent.* 201.—*Show. Parl. Ca.* 151. 3 *Lev.* 284. S. C.

him

him in reverſion; this ſurrender is void. So if a woman that hath title of dower ſurrender it to him in reverſion before ſhe hath recovered it; this ſurrender is void. And yet if leſſee for years after his term is begun and before his entry, when no body doth keep from him the profits, do ſurrender his eſtate; it ſeems this is a good ſurrender; but if another enter before him, and keep him out, it ſeems otherwiſe. If there be leſſee for years, the remainder for life, the remainder or reverſion in fee, and the leſſee for years be ouſted, and he that ouſted him die ſeiſed, and then the leſſee for years enter, and then the tenant for life ſurrender to him in remainder or reverſion in fee; this is not a good ſurrender, for there is in this caſe but a bare right of remainder for life and in fee; but if the leſſee for years had not been ouſted, it had been a good ſurrender. If there be leſſee for years, the remainder for life, the remainder in fee; the leſſee for years may ſurrender to the leſſee for life, and ſo may the tenant for life to him in remainder or reverſion in fee, but if there be tenant for life, the remainder for life, the remainder in fee; in this caſe, the ſecond tenant for life cannot ſurrender to him in remainder in fee. If a leaſe be made for life or years to *A.* the remainder for life to *B.* the remainder in fee tail to *C.* and the firſt tenant for life or years doth ſurrender to *C.* or to the leſſor, *B.* the next in remainder for life being then living; this is not a good ſurrender, neither can it take effect as a ſurrender in reſpect of the intervenient eſtate. And ſo ſome ſay the law is if the middle remainder be but for years only: as if a leaſe be made for years, the remainder for years, and the firſt termor ſurrender his intereſt to the leſſor; this is no good ſurrender. *Sed quære.* For it ſhould ſeem that a future intereſt will no more hinder an actual ſurrender of the firſt leſſee, than a ſurrender in law. And ſo alſo it ſeems the law is for a concurrent leaſe, which, for the latter part of it, is in the nature of a future intereſt. But if in this caſe it fall out the middle remainder be void; as where a leaſe is made to *A.* for life, or years, the remainder to a monk (who is a perſon incapable) for life or years, the remainder to *I. S.* in * fee; in this caſe, *A.* the firſt tenant may ſurrender to him in remainder in fee, and the ſurrender is good. If leſſee for twenty years make a leaſe for five years, and the leſſee for five years enter, and after the leſſee for twenty years ſurrender to him in reverſion or remainder; this is a good ſurrender. So alſo if the two leſſees join in the ſurrender. So alſo if the firſt leſſee ſurrender firſt, and the leſſee for five years ſurrender after. But if the leſſee for five years ſurrender to him in the reverſion, or the remainder, before the ſurrender of the leſſee for twenty years; this cannot take effect as a ſurrender for two cauſes: 1. Becauſe there is a remnant of the term as an intervenient eſtate to hinder the drowning of the term. 2. Becauſe there wants a privity between the leſſee for five years, and him in reverſion. If tenant in fee-ſimple ſurrender to the Lord paramount of whom the land is held; this can never take effect as a ſurrender, unleſs it be in a ſpecial caſe where the Lord hath cauſe to have a *Ceſſavit*. So if tenant in tail ſurrender to him in remainder or reverſion in fee-ſimple; this cannot take effect as a ſurrender. So if leſſee for life ſurrender to him in remainder for years: or tenant for the life of *B.* ſurrender to him that hath an eſtate for the life of *C.* theſe

Perk. ſect. 605. Dier 251.

Perk. ſect. 588.

Dier 112. Plow. 190. Dier 93. Plow. 432, 433.

* P. 305.

Perk. ſect. 604. 14 H. 7. 3. Plow. 541. Bro. Sur. 16.

Bro. Sur. 9. Fitz. Sur. 10.

Perk. ſect. 589. 590. Co. ſuper Lit. 42. 3. 61.

theſe are void ſurrenders; for the eſtates of them to whom they are made, are not capable of ſuch ſurrenders, for they are not greater than the eſtates of the ſurrenderors, and therefore not able to drown the eſtates ſurrendred. And yet if leſſee for the life of another, or for his own life, ſurrender his eſtate to him in remainder that is tenant for his own life; this is a good ſurrender, for an eſtate for a man's own life is greater in judgment of law, than an eſtate for another man's life. And hence it is, that if a leaſe be made to two for their lives, the remainder to a third perſon for his own life, and one of the firſt tenants for life ſurrender his eſtate unto him in remainder for life; this is a good ſurrender for a moiety. If leſſee for life or years, ſurrender to him in remainder or reverſion that hath no good eſtate in the remainder or reverſion, as where the remainder or reverſion is granted by word only, or, being granted by deed, there is no attornment of the tenant to the grant, or the like; this ſurrender is not good. And yet if tenant in tail make a leaſe for life whereby he gaineth a new reverſion (but defeaſible) and the tenant for life doth ſurrender to the tenant in tail; this ſhall be a good ſurrender. So if a woman inheritrix have a huſband, and they have iſſue a ſon, and the huſband dieth, and ſhe take another huſband, and he letteth the land for life, and the wife dieth, and the tenant for life doth ſurrender his eſtate to the ſecond huſband; this is a good ſurrender to moſt purpoſes.

Co. 2. 66.

Co. ſuper Lit. 338.

If a feme ſole be ſeiſed of land in fee, and ſhe make a leaſe thereof to a ſtranger for life, and then take a huſband, and the leſſee * ſurrender to the huſband; this is no good ſurrender, neither can it enure ſo, becauſe he, to whom it is made, hath not the reverſion in his own, but in his wifes right (1).

Perk. ſect. 622.

* P. 306.

It is further alſo required in every good ſurrender, that if it be made by word and without deed, that then it be made in the ſame county where the land to be ſurrendred doth lie, but by writing a man may make a ſurrender of lands that do lie in any other county, and in what place ſoever it doth lie. And a ſurrender may be by word, or writing, of lands lying within the ſame county, in any place out of the land (2). And therefore if tenant for life ſurrender to him in reverſion in any place out of the land within the ſame county, and the ſurrenderee agree to it, the freehold is in him preſently.

Bro. Sur. 2. 8. Fitz. Partition 5. Perk. ſect. 583.

2. In reſpect of the place where it is made: and where the ſurrender of lands in one county, may be good for the lands that do lie in another county: or not.

3. That it be made of ſuch things, of which a ſurrender may be made. For ſurrenders may not be made of eſtates in fee ſimple, or fee tail, nor yet of rights or titles only of eſtates for life or years, nor yet of part of an eſtate for life or years; as if a man have a leaſe for ten years, he cannot ſurrender the laſt ſeven years, and keep to himſelf the three years. But otherwiſe one may ſurrender any kind of eſtate for life, as by dower, by the curteſy, or as tenant in tail after poſſibility of iſſue extinct, or for years, or years determinable upon lives, and that of any meſſuages, houſes, lands, commons, rents, or the like, that are grantable from one to ano-

3. In reſpect of the matter or thing: and of what things a ſurrender may be made; or not.

Bro. Surren. in toto. Per. chap. Sur. in toto. Co. 5. 11. ſuper Lit. 338.

(1) See accordingly 1 *Wood* 748.—and further in *Vin. Abr.* Surrender (A.)

(2) See the note before in this chapter, as to the ſtat. 29 *Car.* 2. *c.* 3.—that ſtat. does not make a deed abſolutely neceſſary to a ſurrender, for it directs it to be made either by deed or *note in writing*, and when it is made by a note in writing, there is no occaſion for any ſtamp-duty, it not being a deed.—1 *Wilſ. Rep. pt.* 2. *p.* 27. *Farmer* on the demiſe of *Earl* v. *Rogers*.

ther,

Perk. ſect. 607, 608, 609. Dier 251. Bro. ſur. 1. 35. 37. 17. 21 H. 7. 7.

ther, and ſuch ſurrenders are good. 4. That there be words, or words and deeds, ſufficient to make the mind of the ſurrenderor to appear that he is willing and deſirous to part with, and yield up, the thing ſurrendred, into the hands of the ſurrenderee. And herein it is to be known, that albeit the words ſurrender, give, or yield up, be the moſt ſignificant and proper words whereby to make a ſurrender, yet any other words, eſpecially if it be in the ſurrender of a leaſe for years, that do teſtify and declare the will and aſſent of him that is the particular tenant, that he in the remainder or reverſion ſhall have the eſtate of the tenant, be ſufficient to paſs the eſtate by way of ſurrender (1). And therefore if leſſee for life or years do by word or writing ſay, that he will hold the land no longer, and wiſh him in reverſion or remainder therefore to enter; or that it is his deſire that he ſhall enter into the land, and have it, and his eſtate therein; or that he is content that he ſhall have his eſtate, or have his leaſe; ſuch, or any ſuch like declaration as this, made to him in reverſion or remainder, will be a good ſurrender. So if leſſee for years deliver his indenture to a ſtranger, to deliver it and all his eſtate up to him in reverſion, and do appoint the ſtranger to deliver and ſurrender it to him in reverſion, and he do ſo, and he in reverſion accept thereof; this is a good ſurrender; but otherwiſe it is of an eſtate for life. So if the particular tenant do by the words give, grant, or confirm, paſs his * eſtate to him in reverſion, and he do enter and agree to it; this is a good ſurrender: and by all theſe ſurrenders the eſtates will paſs by way of ſurrender, except it be in ſome ſpecial caſes where the intent of the parties doth plainly appear to be that the eſtate ſhall not paſs by way of ſurrender. But if a leſſee for life, or years, do only go from the houſe or land, and carry away his goods and cattle, and ſo waive the poſſeſſion for a time, either becauſe the leſſor ſhall not diſtrain them for rent behind, or the like, and thereupon the leſſor doth enter and enjoy it; this is no ſurrender, neither is this a good yielding up of his eſtate. And in ſuch a manner, and by ſuch words as before, any thing that may be granted by word without writing, may be ſurrendred by word without writing, ſo as it be made within the ſame county where the thing ſurrendred doth lie. And this holdeth true, albeit the eſtate to be ſurrendred were created by deed: but ſuch things, as commons, rents, advowſons, reverſions, remainders, and the like, that cannot be granted without deed, cannot be ſurrendred without deed. And therefore if a leaſe be made for life, the remainder for life, by word of mouth without any writing; he in the remainder for life cannot ſurrender his remainder for life without deed. So where one hath a rent, advowſon, or the like, as tenant in dower, or by the curteſy; this cannot be ſurrendred without deed. And in caſe where there is any ſpecial matter to be contained in the ſurrender, as reſervation of rent, condition, or the like, there for the moſt part it muſt be by deed; or it will not be good. And therefore if tenant for life declare himſelf by word of mouth to be contented and agreed that he in the reverſion ſhall have the land and his eſtate therein, rendring ten ſhillings a

Hil. 37 El. B. R. Sleigh & Bateman's caſe.

Perk. ſect. 581, 582, 583. Fitz. ſur. 1. Co. ſuper Lit. 338.

Dier 251. Bro ſur. 16.

4. In reſpect of the manner: and how, and by what words a ſurrender may be made: and where it may be made without deed, and upon condition; or not.

* P. 307.

(1) In the caſe in 1 *Wilſ. pt.* 2. *p.* 27. the court held that the words "*releaſe and diſcharge*" were much ſtronger than words which have in many caſes amounted to a ſurrender, *ut res magis valeat quam pereat.*

year rent, or paying ſuch a ſum of money, or upon condition that if he ſurvive the leſſor he ſhall have it again, &c. this is no good ſurrender. And a ſurrender may be made alſo upon a condition precedent or ſubſequent; as, if it be with reſervation of rent, that if it be not paid it ſhall be void: but if it be an eſtate for life that is ſo ſurrendred, it ſeems it muſt be made by writing indented; and ſo likewiſe it ſhould ſeem the law is of the ſurrender of a leaſe for years upon a condition, or however it is moſt ſafe ſo to do. Perk. ſect. 624. 623. Co. ſuper 218.

5. In reſpect of the agreement of him to whom the ſurrender is made: and what agreement is neceſſary.

5. That the ſurrenderee do agree to, and accept of it; for until then the ſurrender is not perfect: but if the ſurrenderee do once agree to it, he cannot after diſagree; for his firſt agreement doth perfect the ſurrender. But the actual entry of the ſurrenderee into the land is not neceſſary. And therefore if tenant for life or years ſurrender to him in reverſion out of the land, and he agree to it, he hath the land in him preſently. And yet he may not bring any action of treſpaſs againſt any man * for any treſpaſs done upon the land, until he have made his entry. Perk. ſect. 608. Lit. Bro. 163.

* P. 308.

But here note, that in the caſes before, where things may not paſs by way of ſurrender, either becauſe of an intervenient eſtate, or the like; if there be ſufficient words in the deed, it may avail to other purpoſes, and may enure and paſs the thing by way of grant; but then if it be an eſtate for life that is intended to be ſurrendered, there muſt be livery of ſeiſin made upon the deed. And therefore if there be leſſee for years, the remainder for life, or years, the remainder in fee; and the leſſee for years in poſſeſſion doth ſurrender and grant all his eſtate to him in remainder in fee; howſoever this deed cannot enure as a ſurrender, yet it ſhall enure as a good grant of the eſtate of the leſſee for years unto him in remainder in fee. Perk. ſect. 588, 589.

6. How a ſurrender ſhall be conſtrued and taken.

A ſurrender in general ſhall be taken moſt ſtrongly againſt the ſurrenderor, and moſt beneficially for the ſurrenderee. And therefore if I hold of the leaſe of *A.* one acre for life, and another acre for years, and I ſurrender to *A.* all my lands, or all my lands I hold of his leaſe; by this ſurrender both the acres are ſurrendered. But if the ſurrender be of all the lands I have or hold for life, or of all the lands I have or hold for years of the leaſe of *A*, *contra*. And if I hold one acre for life of the leaſe of the father of *I. S.* and I hold another acre for life or years of the leaſe of *I. S.* himſelf, and I ſurrender to *I. S.* all the land I hold of his leaſe; by this the land that I had by the leaſe of his father doth not paſs. A ſurrender to one joint-tenant ſhall be conſtrued to enure to them all. But if tenant for life or years grant his eſtate to one of the joint-tenants in reverſion, it ſeems this ſhall not enure as a ſurrender to them all, but as a grant to him alone. Perk. ſect. 610, 611. Perk. ſect. 615. Bro. ſur. 54. Co. ſuper Lit. 192.

If the leſſor make, and the leſſee take, a new leaſe upon condition, this ſurrender in law is abſolute; and albeit the condition be broken, yet the firſt leaſe is gone. But if the leſſee ſurrender or grant his eſtate to the leſſor upon condition; this condition if it be broken may reveſt the eſtate. Co. ſuper Lit. 218.

See more in the next queſtion, and in *Expoſition of deeds*.

7. Where a feoffment, leaſe, grant, or other act, made, or done by the tenant for life, or years, ſhall be a ſurrender or not: and how it ſhall enure or be conſtrued and taken.

If any kind of tenant for life of land infeoff him in remainder or reverſion of the land, or grant his eſtate to him in remainder or reverſion; this ſhall enure as a ſurrender. And if leſſee for years, before his term do begin, make a feoffment to him in reverſion or remainder, or grant his eſtate to him; this Bro. ſur. 3. 5. Perk ſect. 616. 620. 623. Co. ſuper Lit. 42. Bro. Sur. 49.

this ſhall enure as a ſurrender. And if leſſee for life grant his eſtate to him in reverſion, the remainder in fee to another; this ſhall enure as a ſurrender, and this remainder is void. But if ſuch a tenant for life make a leaſe to him in remainder or reverſion for the term of the life of him in remainder or reverſion; this ſhall not enure as a ſurrender * becauſe it doth not give the whole eſtate, but it ſhall enure by way of grant. So if leſſee for life make a leaſe to him in remainder in tail for term of the life of him in remainder; this ſhall not enure as a ſurrender, but as a grant, and ſhall end with the life of the grantee. If leſſee for forty years make a leaſe for thirty ſeven years on condition, and after grant his eſtate to him in reverſion, and the ſecond leſſee attorn; this ſhall enure as a ſurrender. If there be tenant for life, the remainder in tail to a ſtranger, and the remainder in tail to another ſtranger, the remainder in fee to the tenant for life, and the tenant for life doth make a feoffment to the firſt tenant in tail; this ſhall enure as a ſurrender of the eſtate for life, and as a grant of the reverſion in fee alſo. If tenant for life, being a woman, take a huſband, and then her huſband and ſhe by deed indented make a leaſe to him in reverſion for the life of the huſband; this ſhall not enure as a ſurrender, but as a grant. If there be tenant for his own life, the remainder to *I. S.* for his life, and the firſt tenant for life ſurrender to him in remainder for the life of him in remainder; it ſeems this ſhall enure as a ſurrender, and is no forfeiture: but if he grant it to him for the life of a ſtranger, and make livery of ſeiſin, this is a forfeiture. If leſſee for life, the reverſion being in joint-tenants, grant the land to one or all of the joint-tenants for twenty years; this ſhall not enure as a ſurrender, but as a grant; for there remains an intereſt in the leſſee ſtill as a mean eſtate. If leſſee for years make him in reverſion or remainder his executor; this ſhall not enure as a ſurrender, albeit it do give him the whole eſtate. If lands be given to the huſband and wife, the remainder to *I. S.* and the huſband diſcontinue in fee, and take back an eſtate in him and his wife, the remainder to *W. N.* and die, and the wife claim in by the ſecond eſtate, and ſurrender to *W. N.*; this ſhall not enure as a ſurrender, but as a grant. If leſſee for life or years grant his eſtate to him in remainder or reverſion and a ſtranger; this ſhall enure as a ſurrender of the one half to him in reverſion, and as a grant of the other moiety to the ſtranger. And yet it is ſaid, that if leſſee for life of land grant his eſtate to him in the reverſion and two others, that hereby they have a joint eſtate, and the ſurvivor ſhall have the whole. If leſſee for life make a leaſe for his own life to the leſſor, the remainder to the leſſor and a ſtranger in fee; this ſhall enure as a ſurrender of the one moiety, and a forfeiture of the other moiety. If tenant for life ſurrender to the huſband of a woman tenant in tail or in fee; this ſhall enure as a grant, and not as a ſurrender. And ſo alſo it ſeems is the law, when the ſurrender is to the huſband and wife. And if *B.* be tenant for life, the remainder to *C.* in tail, the remainder to *D.* in tail, and *B.* infeoff *C.* and *S.* his wife in fee; this ſhall not enure as a ſurrender, but it is a forfeiture: ſo that if *C.* die without iſſue, * *D.* may enter. If there be leſſee for life, the reverſion to two coparceners, and one of them take a huſband, and the leſſee doth grant his eſtate to her and her huſband; this ſhall not enure

1. When it is made to him in reverſion or remainder.

* P. 309.

Paſch. 7 Jac. B. R.

Perk. ſect. 621.

Co. ſuper Lit. 42.

Bro. ſurrender 17.

Forfeiture.

Perk. ſect. 615.

Bro. ſurrender 52.

Bro. ſurrender 36.

2. When it is done or made to him and a ſtranger.

Bro. ſurrender 11. Co. 2. 61. 3. 61.

Perk. ſect. 619.

Co. ſuper Lit. 335.

Perk. ſect. 622. Bro. ſurren. 20. 34. 23.

Forfeiture.

Bro. ſur. 46.

* P. 310.

Perk. ſect. 623. 21 H. 7. 40.

enure

enure as a ſurrender, but as a grant. And yet if tenant for life do grant his eſtate to the huſband and wife, ſhe having the reverſion; if ſhe be an infant and within age at this time, it ſeems this ſhall enure as a ſurrender, not as a grant. Bro. Sur 34

3. When it is done with him in reverſion or remainder.

If tenant for life or years, and he in reverſion or remainder, by word without deed join in a feoffment; it ſhall be ſaid the ſurrender of the eſtate for life or years to him in the reverſion, and the feoffment of him in reverſion. But if he in reverſion infeoff the tenant for life without any deed; this ſhall enure firſt as a ſurrender of the leaſe for life, and then as a feoffment. See more in *Deed* (1). Plow. 140. Dier 338.

8. Where a deed or rent may be ſurrendered: and how ſuch a ſurrender ſhall enure or be taken.

If I have a rent in fee, for life, or years, iſſuing out of another man's manor, or other lands, I may ſurrender it; for if I deliver the deed of the grant of the rent to be cancelled unto any one that hath any eſtate of the manor or land in fee-ſimple, for life, or years, in poſſeſſion or remainder, either ſolely by himſelf, or jointly with others, this is a good ſurrender, and hereby the rent is extinct and gone. But one that is tenant in tail of a rent cannot ſurrender it, neither will the delivering up of the deed in this caſe determine the rent. And if one be ſeiſed of land, out of which a rent is iſſuing in fee, and is diſſeiſed, and during the diſſeiſin the grantee of the rent ſurrender his rent, and give up his deed; it ſeems this doth not extinguiſh the rent; yet hath the grantee no remedy for his rent when he hath delivered up his deed. And yet if one be ſeiſed of land in fee out of which a rent is iſſuing in fee, and he die without heir, ſo that the land eſcheat, and before the Lord enter upon his eſcheat, he that hath the rent doth ſurrender the deed of the rent to the lord; it ſeems this is a good ſurrender to extinguiſh the rent. And if the grantee of a rent-charge in fee grant the ſame to him in fee that is ſeiſed of the land in fee; this ſhall enure to extinguiſh the rent; but if he grant it to one that hath only an eſtate for life, *contra*. 14 H. 7. 2. Perk. ſect. 591. 596. 596. 593. Perk. ſect. 594. Perk. ſect. 595 Perk. ſect. 597.

And now by this time it is high time we come to *Confirmations* and *Releaſes*, which ſerve to enlarge and amend the eſtate and intereſt that a man hath in a thing already.

(1) And further to whom a ſurrender may be made in *Com. Dig.* Surrender (F.)—*Vin. Abr.* Surrender (B.)

CHAP. XVIII.

CHAP. XVIII.

Of a Confirmation.

1. Confirmation. *Quid.*

Terms of the law. Co. ſuper Lit. 295.

A Confirmation is the conveyance of an eſtate or right, that one hath in or unto lands or tenements, to another that hath the poſſeſſion thereof, or ſome eſtate therein; whereby a voidable eſtate is made ſure and unavoidable, or whereby a particular eſtate is increaſed and inlarged (1). And this albeit it may be made by other words as by *Dedi*, or *Conceſſi*, which are general words, and ſerve to make a grant, feoffment, leaſe, releaſe, *&c.* yet it is moſt commonly and properly made by theſe words, *Confirmaſſe, Ratificaſſe & approbaſſe*, which do ſignify *ratum et firmum facere, & ſupplere omnem defectum*. And he thatmakes the confirmation is ſometimes called the confirmor, and he to whom it is made the confirmee.

Confirmor. Confirmee.

2. *Quotuplex.*

Co. ſuper Lit. 295. Plow. 140. Lit. ſect. 515. Co. 9. 142.

There are two kinds of confirmations, *viz.* a confirmation implied or in law; which is when the law by conſtruction makes a confirmation of a deed, made to another purpoſe; and a confirmation expreſs or in deed; which is when the act done, or deed made, is intended for a confirmation. And both theſe are always in writing. The latter is properly called a deed or inſtrument of confirmation; and is made after this manner, *Noveritis univerſi, &c. me* A. *de* B. *ratificaſſe, approbaſſe & confirmaſſe* C. *de* D. *ſtatum & poſſeſſionem quos habeo de & in uno meſuagio, &c. cum pertinen. in* F. *&c.* A confirmation is alſo diſtinguiſhed by its effects: for ſometimes it doth tend and ſerve to confirm and make good a wrongful and defeaſible eſtate, or to make a conditional eſtate abſolute: and then it is ſaid to be *confirmatio perficiens*. And ſometimes it doth tend and ſerve to encreaſe and enlarge a rightful eſtate, and ſo to paſs an intereſt: and then it is called *confirmatio creſcens*. And ſometimes it doth tend and ſerve to diminiſh and abridge the ſervices, whereby the tenant doth hold: and then it is called *confirmatio diminuens*.

3 The nature and operation of it in in general.

Co. 146. 147. Dier 109. 7 H. 6. 7. Lit. ſect. 519. Co. 9. 242.

The nature and work of this, where it doth find a foundation to work upon, is either to encreaſe and enlarge the eſtate of him to whom it is made from a leſſer to a greater, and to give him ſome new intereſt he had not before; or to corroborate and perfect the eſtate that was imperfect before; or to change the quality of it, from an eſtate upon condition, to an abſolute eſtate or otherwiſe; for this a confirmation will do. In ſome caſes alſo it will extinguiſh rights and titles of entry. But it will not make an eſtate good that is meerly void; nor add to, nor take from an eſtate a deſcendible quality; nor make a man capable of it that is incapable, of himſelf, * or *e contra*. In ſome caſes alſo it will leſſen and diminiſh rents or ſervices; but it cannot neither will change the nature of the ſervice into

* P. 312.

(1) Confirmation is the approbation or aſſent to an eſtate already created, which, as far as in the confirmer's power, makes it good and valid: ſo that the confirmation doth not *regularly create an eſtate*, but yet ſuch words may be mingled in the confirmation, as may create and enlarge an eſtate; but that is by the force of ſuch words as are foreign to the buſineſs of confirmation, and by their own force and power tend to create the eſtate. *Gilb. Ten.* 75. Confirmation is of a nature nearly allied to a releaſe, 2 *Bl. Com.* 325.

ſome other kind of ſervice, nor increaſe it into a greater ſervice.

4. Where the confirmation of ſome perſons is needful to perfect the grant of others: or not: and how it may be done.

If a Biſhop, Dean, Archdeacon, Prebendary, or the like, make any leaſe of the land they have in the right of their biſhoprick, deanry, archdeaconary, or prebend not warranted by the ſtatute of 32 *H.* 8. and within the other ſtatutes; it ſeems this leaſe muſt be confirmed by the Dean and Chapter by their common ſeal; and if there be two Chapters, it muſt be confirmed by them both; or otherwiſe it is not good. But if the leaſe be ſuch a leaſe as is warranted by the ſtatutes, the Biſhop may make it without the confirmation of the King, the patron, and founder of Biſhopricks, or the Dean and Chapter, and ſo alſo it ſeems of the reſt. And a corporation aggregate, as Dean and Chapter, Maſter and Fellows, and the like, may grant without any confirmation of the founder, and this grant will be good (1). If a Biſhop, *&c.* grant an ancient office belonging to his biſhoprick, albeit it be but for the life of the grantee, yet it muſt be confirmed by the Dean and Chapter, otherwiſe it is not good. If a Parſon or Vicar had made any leaſe for longer time than his own life, it muſt have been confirmed by the Patron and Ordinary. But at this day, albeit it be confirmed by the Patron and Ordinary, yet the leaſe is good for no longer than during the Parſon's ordinary reſidence, except it be impropriated.

Co ſuper Lit. 300. 301. Co. 10. 62, 5. 3. Dier 145, 273, 349. 338, 339. 61.

Co. 10. 62.

Dier 52. ſtat. 13 El. ch. 20.

If tenant for life grant a rent-charge to *I. S.* and his heirs; in this caſe, he in reverſion muſt confirm it; otherwiſe the grant of the rent will be good for no longer than the life of the tenant for life.

Co. 1. 147.

Where a man hath an intereſt in any lands, tenements, rents, commons, felons goods, or the like, by any grant of any of the Kings of the realm, he need not have the confirmation of every or of any ſucceeding King. Alſo it ſeems grants of fairs, markets, warrens, and the like, made by one King, will be good in law againſt his ſucceſſors without any confirmation. But all ſuch as have any judicial or miniſterial offices, commiſſions and authorities, derived from the King, muſt have the confirmation of every ſucceeding King, otherwiſe they may loſe them.

Co. 8. 167. Dier 277. Dier 327. lit. Bro. 203. Kelw. 145. 138.

5. What confirmations may be made: and what ſhall be ſaid a good expreſs or implied confirmation, or not: and by what words it may be made.

1. To confirm or alter the quality of the eſtate of him to whom it is made.

In every good confirmation tending to confirm an eſtate, or alter the quality of it, theſe things muſt concur: 1. There muſt be a good confirmor and a good confirmee, and a thing to be confirmed, as in other grants; and the deed muſt be well ſealed, *&c.* 2. There muſt be a precedent rightful or wrongful eſtate in him to whom the confirmation is made, in his own or in another's right; or at leaſt he muſt have the poſſeſſion of the thing whereof the confirmation is to be made, that may be as a foundation for the confirmation to work upon. As if feoffee on condition make a feoffment over, and the feoffor confirm his eſtate to him to whom the ſecond * feoffment is made and his heirs; this is a good confirmation to make his eſtate abſo-

Co. 1. 146. 9. 142. 7 H. 6, 7.

* P. 313.

Lit. ſect. 516.

(1) To the grants of a *ſole corporation*, as Parſon, Prebendary, Vicar and the like, the patron muſt give his conſent; becauſe ſuch *ſole corporation* has not the abſolute fee: but a *corporation aggregate*, as Dean and Chapter, Maſter Fellows and Scholars of a college, *&c.* or any *ſole corporation that has the abſolute fee*, as a Biſhop with conſent of the Dean and Chapter, may by the common law make any grant of their poſſeſſions, without their founder or patron. *Co. Lit.* 300. b.—See further in what caſes the confirmation of the patron and ordinary is neceſſary; and as to confirmation by Dean and Chapter of the grant of the Biſhop; in *Vin. Abr.* Confirmation (G.) (H.)—*Bac. Abr.* Leaſes (G).

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lute. And if leſſee for life make a feoffment in fee, or leaſe for years, and the firſt leſſor confirm this ſecond eſtate, it ſeems this is a good confirmation. And if one diſſeiſe me of land, I may after confirm the eſtate of the diſſeiſor, or of his heir if he be dead, or of his feoffee if he have aliened it; and this will make his eſtate good for ever: and if the diſſeiſor make a leaſe for life, or years of it, I may confirm the eſtate of the leſſee, and this will make it good for the time. And if one make a leaſe for life abſolute, or a feoffment in fee, or leaſe for life on condition, or be diſſeiſed of land, and the leſſee for life, feoffee or diſſeiſor, doth grant a rent out of the land in fee, and the leſſor, feoffor, or diſſeiſee doth confirm the eſtate of the grantee; this doth make good the grant for ever. And ſo alſo if the heir of a diſſeiſor that is in by deſcent grant a rent-charge, and the diſſeiſee confirmeth it; this is a good confirmation. And if an infant make a leaſe for twenty years, and the leſſee doth make a leaſe to another for all or part of the time, and the infant at his full age doth confirm this ſecond leaſe, this is a good confirmation and doth perfect the leaſe; for it is a rule, that which I may defeat by my entry, I may confirm by my deed. But if there be no precedent eſtate on which the confirmation may work, or the eſtate be ſuch an eſtate as is meerly void, then is the confirmation void, and cannot take effect as a confirmation; as for example, if a man aſſign dower to a woman that hath nothing to do with it, or a court that hath not power doth make leaſes by commiſſion, or an eſtate that was upon condition is avoided by entry, or a leſſee ſurrender, or a diſſeiſee enter upon a diſſeiſor, and afterwards he that hath the rightful eſtate confirm their eſtates ſo defeated and gone, theſe confirmations are void: *Debile fundamentum fallit opus*. And a confirmation to him that hath nothing in the land is void. And hence it is, that if one confirm all his eſtate that he hath granted to another, when in truth he hath granted none at all, this is void. And ſo alſo it is, if there be an eſtate and no poſſeſſion: as if a diſſeiſor make a leaſe for years to begin at *Michaelmas*, and before the day the diſſeiſee doth confirm the eſtate of the leſſee for years; it is ſaid this is not a good confirmation, *ſed quære*. 3. The confirmor muſt have ſuch an eſtate and property in the thing whereof the confirmation is made, as he may be thereby enabled to confirm the eſtate to the confirmee; as the leſſors, feoffors, and diſſeiſees in the caſes before have; otherwiſe the confirmation is void: and therefore if the heir of the diſſeiſee during the life of the diſſeiſee confirm to the diſſeiſor, this is no good confirmation to perfect his eſtate, albeit the diſſeiſee die, and the right of the land deſcend to his heir afterwards. So if land be given to *A.* and *B.* his wife, and the heirs of their bodies iſſuing, the remainder in fee to *A.* and *A.* levy a * fine with proclamations and die, and ſhe within five years doth enter and claim, and after the conuſee doth confirm the eſtate made by the firſt gift to the wife, to have and to hold according to the ſame; this confirmation is to no purpoſe. So if leſſee for life make a leaſe for thirty years, and after he in reverſion and the leſſee for life leaſe for ſixty years; in this caſe he cannot confirm the leaſe for thirty years, becauſe he hath granted it before for ſixty years. And hence it is alſo, that the confirmation by one joint-tenant of the eſtate of his companion worketh

Co. 9. 142. 6. 15. Perk. ſect. 86. Lit. 518. 521. 11 H. 7. 29. 28.

Co. 1. 144. Lit. ſect. 527. 529. 11 H. 7. 28. Co. ſuper Lit. 300. Lit. ſect. 547. 11 H. 7. 28.

Infant.

Co. ſuper Lit. 295. 301. Dier 263.

4 H. 7. 10.

Dier 109.

9 H. 6. 62.

Co. 9. 138.

* P. 314.

Co. ſuper Lit. 296.

Fitz. Confirmation 15.

Joint tenants.

worketh nothing; for their eſtates are equal, and each hath intereſt in the whole land. And yet if one joint-tenant confirm the whole land to his companion, to have and to hold the land to him and his heirs; this ſhall amount to a grant, and ſo will be good to paſs his moiety. And hence it is alſo, that if a man grant a rent-charge out of his land to another for life, and then confirm his eſtate without any clauſe of diſtreſs (for by a clauſe of diſtreſs a grant of a new rent may be made) to have and to hold to him in fee-ſimple, or fee-tail; this is void, for the confirmor hath no reverſion of the rent in him. 4. The precedent eſtate muſt continue until the confirmation come; as in all the caſes of voidable eſtates the confirmation muſt be before the eſtates be made void by entry; *&c.* or otherwiſe the confirmation will be void. And therefore if leſſee for life or years ſurrender, or the diſſeiſee enter upon the diſſeiſor, and after the leſſor or the diſſeiſee confirm the eſtate of the leſſee or diſſeiſor; this confirmation comes too late. 5. The eſtate precedent, and that which is to be confirmed, muſt be lawful and not prohibited by any Act of Parliament. And therefore if a ſpiritual perſon, as Prebend, or the like, make a leaſe not warranted by the ſtatutes; the confirmation of the Dean and Chapter will not help nor amend it. And if tenant in tail made a voidable leaſe, and after confirm it himſelf, this is voidable ſtill. 6. There muſt be apt words of confirmation in the deed or inſtrument. And herein note, that albeit the words *confirmavi, ratificavi, & approbavi* be the moſt ſignificant and proper words to make this conveyance, yet ſuch as are made by other general words may make a good confirmation. And therefore it is agreed, that a deed made by the words *dedi, conceſſi* or *demiſi*, may make a good confirmation. And therefore that if the diſſeiſee, coparcener, or leſſor, make a deed of the land by the word *dedi* or *conceſſi* to the diſſeiſor, other coparcener, or leſſee for life, and deliver the deed; this is a good confirmation without livery of ſeiſin (1). Alſo if a feoffment be made to *A.* to the uſe of *B.* and his heirs upon condition, and before the condition broken, the feoffor and *B.* do join in the grant of a rent-charge, and after the condition is broken; in this caſe, the law doth interpret this a good grant from *B.* and a good confirmation of * the feoffor without any words of confirmation. So if tenant for life do grant a rent to him in reverſion, and he by deed doth grant it to another and his heirs in fee; in this caſe, the law doth conſtrue this a good grant and a confirmation alſo. And in theſe caſes of con-

Lit. ſect. 523. Dier 263.

Lit. ſect. 543. Co. ſuper Lit. 308.

Co. 5. 15. Lit. ſect. 607.

Lit. ſect. 531. 532. 10 E. 4. 3. Co. ſuper Lit. 295. Dier 116. Co. 1. 147. 5. 15.

Livery of ſeiſin.

* P. 315.

(1) The words *dedi & conceſſi*, are as ſtrong as the word *confirmavi*, for they amount to a grant of the right of the perſon in poſſeſſion; and if he has my right I can never after impeach his eſtate. *Gilb. Ten.* 79.—See further what words ſhall enure as a confirmation, in *Vin. Abr.* Confirmation (X.)——*Madox* in p. 19 of the *Diſſert.* prefixed to the *Formul. Angl.* ſays, that moſt ancient confirmations made after the conqueſt, often run like feoffments, with the words, *Dedi*, or *Conceſſi*, and *Confirmavi:* and are diſtinguiſhable from the feoffments, chiefly by ſome words importing a former feoffment or grant; as where they run, *Dedi*, or *conceſſi & confirmavi*, ſuch lands *ſicut charta facta* to ſuch a one (either the confirmatary or his anceſtor) *teſtatur*, or the like.—In ancient time, when feoffees were frequently diſſeiſed of their lands upon ſome ſuggeſtion or other, charters of confirmation ſeem to have been in great requeſt. For in the early times after the conqueſt, we meet with ſo many confirmations ſucceſſively made to the ſame perſons, or their heirs or ſucceſſors, of the ſame lands and poſſeſſions; that it looks as if men did not then think themſelves ſecure in their poſſeſſions againſt the King or other great Lords, who were their feoffors, or in whoſe fees their lands lay, unleſs they had repeated confirmations from the King or his heirs or ſucceſſors, or the other great Lords or their heirs. And theſe confirmations, very anciently, ſeem to have been ſometimes made either by precept or writ from the King or other Lords, to put the feoffees or their heirs or ſucceſſors into ſeiſin after they had been diſſeiſed, or to keep them in their ſeiſin undiſturbed, or elſe by charter of expreſs confirmation.

L. in. sect. 519. Co. super Lit. 296. firmations of eſtates, if it be by the diſſeiſee to the diſſeiſor; it is good without any words of heirs: as if the diſſeiſee confirm the eſtate of the diſſeiſor, or confirm the land unto him, and ſay not to him and his heirs; this is an effectual confirmation to him and his heirs for ever. And if a leſſee for life or a diſſeiſor make a leaſe for life, or years, *&c.* and he in the reverſion, or the diſſeiſee confirm their eſtates, and not the land, and without any *Habendum* or limitation of eſtate; this is good Co. 1. 147. for ſo long as the eſtates do continue. But it is moſt ſafe always to expreſs the eſtate, *i. e.* to ſay, to have and to hold the land to him and his heirs, or for life, *&c.* as the agreement is. If leſſee for life grant a rent to one and his heirs out of the land, and the leſſor doth confirm the eſtate, or the rent-charge, this doth make the eſtate of the rent ſure. And ſo alſo if he do confirm the rent, and ſay, to have and to hold to him and his heirs; this is a good confirmation. But if he confirm the rent, to have and to hold to him in fee, without naming his heirs, hereby his eſtate is not made better (1).

Co. 9. 139. F. N. B. 136. Co. 8. 76. Dier 10. If the leſſor confirm the eſtate of his leſſee for life with this clauſe, to hold without impeachment of waſte; this is a good confirmation to change the quality of the eſtate ſo far as to make it diſpuniſhable of waſte. So if the lord paramount confirm the eſtate of the meſne with clauſe of acquittal. And ſo if leſſee for years, or for another's life, be without impeachment of waſte, and the leſſor confirm to him for his own life, and omit that clauſe; hereby this priviledge is gone and the eſtate is become puniſhable for the waſte.

2. To enlarge the eſtate of him to whom it is made.

Co. 9. 142. ſuper Lit. 305. Dier 145. 296. Co. 6. 15. Lit. ſect. 533, 532. 523. Dier 263. This kind of confirmation *creſcens*, muſt have all the qualities of the former: and there muſt be alſo in this caſe a privity between the confirmor and the confirmee. And then it may enlarge the eſtate of him to whom it is made, as from an eſtate at will to an eſtate for years, or to a greater eſtate; from an eſtate for years, to an eſtate for life, or to a greater eſtate; from an eſtate for life, to an eſtate in tail, or in fee; and from an eſtate tail, to an eſtate in fee; and theſe confirmations are good. But in all theſe kinds of confirmations, care muſt be had of the manner of penning them; and that in every ſuch deed there be a limitation of the eſtate; *i. e.* that theſe words be inſerted, to have and to hold the tenements, *&c.* to him and his heirs; or to him and the heirs of his body; or to him for term of life, or years; as the agreement is; for if leſſee for life make a leaſe for years, and then leſſee for life and he in reverſion, confirm the land, to have and to hold to him for life, or to him and his heirs; theſe words will make the eſtate to encreaſe. But * if the confirmation be made to the leſſee for life or for years of his term or eſtate, and not of the land; as when he doth confirm his eſtate, to have and to hold his eſtate to him and his heirs; this doth not increaſe the eſtate. And yet if he confirm the land, to have and to hold the land to him and his heirs; this will increaſe the eſtate, *Et ſic de ſimilimus.*

Lit. ſect. 524. 545. Plow. 540. * P. 316.

(1) See accordingly verbatim in 1 *Wood* 720.—If the ſtudent compares this chapter on confirmation, or any other in this book, with the chapter on the ſame doctrine, in 1 *Wood*, he will eaſily diſcern how much the author of that book ſtands indebted to the *Touchſtone*. It is to be lamented that in copying the *Touchſtone*, he has very frequently tranſpoſed the parts of it, and thereby greatly diminiſhed the order of its beautiful analytic arrangement.

If the husband have an estate of land for life, or years, in the right of his wife; or to them both for life, and a confirmation to him alone, of his estate, or of the land, to have and to hold the land to him and his heirs: this is a good conveyance of the fee-simple to him after the death of his wife. And if I let land to a woman sole for the term of her life, who taketh a husband, and after I do confirm the estate of the husband and wife, to have and to hold for term of their two lives; this is good, but it shall enure only to enlarge his estate for term of his life if he survive his wife. But if one lease to another for life, and after confirm the estate of the lessee to him and his wife for term of their two lives; this is void as to his wife. Co. super Lit. 299. Plow. 160. Lit. sect. 525. Fitz. Confirmation 7, 17.

If one grant a rent-charge out of his land for life, and after the grantor confirm the estate of the grantee in the rent without any clause of distress, to have and to hold to him in fee-simple, or fee-tail; this confirmation is not effectual to enlarge the estate. But if a man be seised of an old rent-charge or rent-service, and grant the same first for life, and after confirm the estate of the grantee in fee-simple or fee-tail; this is good, and will enlarge the estate accordingly. Lit. sect. 548. 549.

If tenant for life grant a rent out of the land, to one and his heirs during the life of the lessee for life, and after the lessor confirm the rent to the grantee and his heirs; it seems the estate is not hereby enlarged, but when the tenant for life doth die, the rent shall cease. Co. 1. 147.

This kind of confirmation may be made by the same words as the former, *viz.* by the words, give, grant, or demise. But neither of these may be made by the words surrender, release, exchange, or the like: for these are peculiar words destined to a special end, being proper and peculiar manner of conveyances. And yet if I that am a lessor do say to my lessee for years by my deed, I will that you shall hold the land for your life; this is a good confirmation to encrease the estate by this word *volo* only. So if I grant to my lessee for years, that he shall hold the land for term of his life, this without any other words is a good confirmation. Co. super Lit. 301. b. Fitz. Confirmation 23.

3. To diminish or abridge the services, &c.

By a confirmation the lord may confirm the estate of his tenant which holdeth by knight's service to hold in socage; or to hold for a less rent; or to hold at common law, where before he did hold in ancient demesne; and such a confirmation is good. But such a * confirmation as is to hold by new services, as a rose for money, or the like, is not good for that purpose. And in this case there must be also a privity. And therefore if there be Lord, mesne, and tenant, and the Lord confirm the estate of the tenant to hold by less services; this is void. And if the Lord confirm to his tenant after he is disseised before his entry, to hold by less services; this is void. Co. 9. 142. Lit. sect. 538.

* P. 317.

6. Where a confirmation may be good for part of the estate, or for part of the thing: or not.

A confirmation may be by apt words in case of a lease for years for part of the time, but in case of a freehold it cannot be so. And so also it may extend to part of the thing before in estate. And therefore if a disseisor, tenant in tail, or husband of the land he hath in the right of his wife, or lessee for life, make a lease for years, and the disseisee, issue in tail, wife, or lessor make a confirmation of all the land for part of the time, or of part of the land for all the time; this confirmation is good. But if any such person make a lease for life, gift in tail, *&c.* the disseisee *&c.* Co. 5. 82. 82. Lit. sect. 519. Co. super Lit. 297. Lit. sect. 520.

cannot confirm part of the eſtate but he muſt confirm all. And therefore if he confirm his eſtate for one hour, it is a confirmation of the whole eſtate. And ſo alſo if he confirm the land to the diſſeiſor himſelf but one hour, one week, one year, or for his life, &c. this is a good confirmation of the eſtate for ever. And if it be a leaſe for years that is confirmed, care muſt be had to the manner of the confirmation; for if the confirmation be of the eſtate or the term for one hour, this is a good confirmation for the whole time: and therefore the confirmation muſt be had of the land, to have and to hold for part of the term; and being ſo made, it may be good for that time only, and no longer.

11 H. 7. 29. Co. 1. 146. 2. 142. If I make feoffment on condition, and before the condition broken I confirm the eſtate of the feoffee abſolutely; this will not extinguiſh the condition. And yet if the condition be broken firſt, ſo as my entry is lawful; in this caſe, the confirmation will extinguiſh the condition. And if the feoffee on condition make a feoffment over abſolutely to another, and I confirm the eſtate of the ſecond feoffee, whether it be before or after the condition broken; by this the condition is diſcharged.

7. The force and virtue of of it: and how it ſhall enure and be conſtrued and taken.

Lit. ſect. 515, 536, 537. If the Lord confirm the eſtate of his tenant in the tenements; or one that hath a rent, common, or profit out of land confirm to the terre-tenant his eſtate; in theſe caſes, notwithſtanding this confirmation, the ſeignory, rent, common, &c. do continue, and this ſhall not enure to extinguiſh it.

Co. ſuper Lit. 298. If the diſſeiſee and a ſtranger diſſeiſe the heir of the diſſeiſor, and the diſſeiſee confirm the eſtate of his companion; this ſhall not enure to extinguiſh the ſuſpended right of the diſſeiſee, but when the heir of the diſſeiſor ſhall re-enter it ſhall be revived. And if the grantee of a rent-charge, and a ſtranger diſſeiſe the tenant of the land, and the grantee confirm the eſtate of his companion; * this ſhall not enure as to the rent ſuſpended, to extinguiſh it, but after the re-entry of the tenant, the rent ſhall be revived.

* P. 318.

Co. ſuper Lit. 305. If a man hold his land of me by Knight's ſervice, rent, ſuit of court &c. and I confirm his eſtate to hold of me by Knight's ſervice only, for all manner of ſervices and demands; in this caſe, albeit this do abridge the ſervice, yet it ſhall not be conſtrued to take away wardſhip, relief, and to marry my daughter, and make my ſon Knight, and the like.

See before If I have an eſtate in land for my life, and he in reverſion doth confirm the eſtate to me and my wife for the term of our lives, this ſhall enure only as a confirmation of my eſtate, and not ſo as to give any eſtate to my wife. But if I have a leaſe for life or years in right of my wife, and he in the reverſion do confirm the eſtate to me and my wife, to have and to hold to us for our lives; this ſhall enure not only to confirm the eſtate, but alſo to create an eſtate to me after my wife's death: and in the caſe of a leaſe for years, it maketh our eſtate joint; but in the caſe of a leaſe for life, I ſhall take by way of enlargement of eſtate for my life after my wife's death. And if in this caſe the confirmation be to me and my wife, to have and to hold the land to us two and our heirs; this ſhall enure to us in fee-ſimple as joint-tenants.

Co. ſuper Lit. 299. If land be let to huſband and wife, to have and to hold the one moiety to the huſband for his life, and the other moiety to the wife for her life, and the leſſor confirm to them both their eſtate in the land, to have and to hold to them and their heirs; in this caſe, as to the one moiety

moiety, it doth enure only to the huſband and his heirs, but as to the other moiety they ſhall be joint-tenants. And yet if ſuch a leaſe for life be made to two men by ſeveral moieties, and the leſſor confirm their eſtates in the land, to have and to hold to them and their heirs; by this they are tenants in common of the inheritance.

If the diſſeiſee confirm the eſtate of the diſſeiſor, to have and to hold to him and his heirs of his body engendred, or to have and to hold to him for term of his life; this ſhall enure to him as a fee-ſimple, and ſhall confirm his eſtate for ever. Lit ſect. 419.

If my diſſeiſor make a leaſe for life, the remainder over in fee, and I confirm the eſtate of the tenant for life; this ſhall not enure to, nor avail him in remainder. And if the diſſeiſor make a gift in tail, the remainder to the right heirs of the tenant in tail; and the diſſeiſee confirm the eſtate of the tenant in tail; this ſhall not extend to the fee-ſimple, no more than if the diſſeiſor make a gift in tail, the remainder for life, the remainder to the right heirs of the tenant in tail; and the diſſeiſee confirm the eſtate of the tenant in tail; for this ſhall extend only to the eſtate tail, and not to the remainder for life or in fee. But if the diſſeiſee in the firſt caſe confirm the eſtate of him in the remainder; this ſhall enure * to and avail the tenant for life. And ſo if a diſſeiſor make a leaſe for life and keep the reverſion, and after the diſſeiſee doth confirm to the diſſeiſor; this ſhall enure to the tenant for life. And ſo if a diſſeiſor make a leaſe for life to *A.* and *B.* and the diſſeiſee confirm the eſtate of *A.* this ſhall enure to *B.* and make his eſtate good alſo in the other moiety. And ſo if there be two diſſeiſors, and the diſſeiſee confirm the eſtate of one of them without ſaying more; this ſhall enure to them both. But if the confirmation be of the land, to have and to hold the land to one; in this caſe, it may enure to him alone. So if a diſſeiſor infeoff *A.* and *B.* and the heirs of *B.* and the diſſeiſee confirm the eſtate of *B.* albeit it be but for his life; yet this ſhall enure to both and to the whole fee-ſimple.

* P. 319.

If a leaſe be made for life to *A.* the remainder to *B.* for life, and the leſſor confirm their eſtates in the land, to have and to hold to them and their heirs; this ſhall enure as to the one moiety to *A.* in fee after the death of *B.* and as to the other moiety in fee to *B.* after the death of *A.* Co. ſuper Lit. 299.

If lands be given to two men and the heirs of their two bodies begotten, and the donor doth confirm their eſtates in the land, to have and to hold the land to them two and their heirs; it ſeems this ſhall enure to them as a joint eſtate for their lives, and after for ſeveral inheritances. Co. Idem.

If the leſſee for life, or the diſſeiſor, doth make an abſolute leaſe for years, and he in the reverſion, or the diſſeiſee, doth confirm the eſtate of the leſſee for years; this makes the leaſe good for all the time. So if the diſſeiſor makes a leaſe for life, and the diſſeiſee doth confirm the eſtate of the leſſee for life; this makes the eſtate good for the life. And if he in reverſion confirm the eſtate of the termor but one hour; this doth make it good for all the term. And if an eſtate for life or in fee be confirmed but for one hour; it is a good confirmation for all the eſtate. And if the diſſeiſee confirm the eſtate of the diſſeiſor, to have and to hold for one hour, year, or for life, or in tail; this is a good confirmation for ever, and makes his Lit. ſect. 516. 521. 519. 520. 541. Co. 5. 79.

eſtate

eſtate unavoidable. And yet if the diſſeiſee confirm the land, *Habendum* the land for life, or in tail, &c. *contra.*

Dier 52. 339. Co. 5. 81. If a voidable leaſe be made for forty years, and the leſſor confirm the term for twenty years; this is a good confirmation of the whole term. But if he confirm the land for twenty years, it may be good for that time only, and no longer; wherein, as in divers other caſes before, obſerve that the very words, whereby the confirmation is made, are much to be heeded; for *parols font plea.*

Lit. ſect. 606. 607. 610. If tenant in tail or for life of land, letteth it for years, and after confirm the land to the leſſee for years, to have and to hold to the leſſee and his heirs for ever: by this the leſſee hath only an * eſtate for term of the life of the tenant in tail, or for life; and therein his leaſe for years is extinct. * P. 320.

Co. 1. 147. ſuper Lit. 301. If tenant for life doth grant a rent to another and his heirs during the life of the tenant for life, and the leſſor confirm to the grantee and his heirs; this ſhall be conſtrued to be an eſtate for life only, and no enlargement of the eſtate. But if tenant for life grant a rent-charge in fee, and the leſſor confirm it, this ſhall be conſtrued to be a confirmation of the fee-ſimple.

See more in *expoſition of deeds, cap. 5. in toto:* and more alſo in the chapter of *releaſe*, whereunto we are now come in the next place.

CHAP. XIX.

Of a Releaſe.

1. Releaſe. *Quid.*

A Releaſe is the giving or diſcharging of the right or action which a man hath, or may have or claim, againſt another man, or that which is his. Or it is the conveyance of a man's intereſt or right, which he hath unto a thing, to another that hath the poſſeſſion thereof or ſome eſtate therein (1). And this, albeit it may be made by other words, as *dedi*, *conceſſi*, or *renunciavi*, or ſuch like, yet it is moſt commonly and properly made by theſe words, *remiſi*, *relaxavi*, & *quietum clamavi*, all which are much to one purpoſe (2). He that makes the releaſe is ſometimes called the releaſor, and he to whom it is made, the releaſee.

Terms of the law. Weſt. ſymb. l. 2. ſect. 466.

Releaſor. Releaſee.

2. *Quotuplex.*

There are two kinds of releaſes like unto thoſe of confirmation, *viz.* a releaſe expreſs or in deed; and that is a purpoſed releaſe, when the act done, or deed made, is intended a releaſe. And this is always done by writing. And then it is defined by ſome to be an inſtrument whereby eſtates, rights, titles, actions, and other things be ſometimes extinguiſhed, ſometimes transferred, ſometimes abridged, and ſometimes enlarged, which is after this manner. *Noverint, &c. me* A. *de* B. *remiſiſſe, relaxaſſe, & omnino de me* [*vel pro me*] *& hered. meis quietum clamaſſe* C. *de* D. *totum jus, titulum & clameum quæ habui, habeo, vel quoviſmodo in futuro habere potero, de & in uno meſuagio cum pertin. in* F. *&c.* And a releaſe implied or in law; and that is when the law by intendment and conſtruction and by way of conſequent doth make a releaſe of an act done to another purpoſe. And this is ſometimes by writing, and ſometimes without writing. Theſe releaſes alſo are ſometimes of a bare and naked right, and ſometimes of a right accompanied with ſome eſtate or intereſt; and ſometimes they are of actions real or in lands or tenements, and ſometimes of actions perſonal of or in goods or chattels, and ſometimes of actions mixt partly in the realty and partly in the perſonalty (3).

Co. ſuper Lit. 264. 265.

* P. 321.

3. The nature and operation of it in general.

* A releaſe is much of the nature of a confirmation; for in moſt things they agree and produce the like effects. This therefore is ſaid ſometimes to enure by way of *mitter le eſtate*, *i. e.* by way of giving or transferring or enlarging of an eſtate or intereſt; and ſo doth give ſome new intereſt or eſtate to him to whom it is made. And ſometimes it is ſaid to

Co. ſuper Lit. 193. 273. 277. Co. 1 147. Lit. ſect. 606. 459. 465. 466. 446.

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(1) For it is contrary to the nature of a releaſe to give poſſeſſion, 4 *Co.* 25.—*Hutt.* 65.—and therefore one tenant in common cannot releaſe to his companion becauſe they have diſtinct freeholds, *Co. Lit.* 200.—A releaſe cannot operate but upon an eſtate, intereſt, or right, *Rol. Rep.* 197.—When a man has the right and poſſeſſion in him, he muſt convey by feoffment, which made a notoriety amongſt the tenants by the feoffment *coram paribus.* When a man was out of poſſeſſion, he might convey by releaſe only; for the diſſeiſor had the poſſeſſion, which of itſelf made the notoriety, and the releaſe transferred the right; ſo that a releaſe is a conveyance of right to a perſon in poſſeſſion.—*Gilb. Ten.* 53.

(2) Ancient releaſes were uſually diſtinguiſhable from feoffments by the words *quietum clamavi*, *remiſi*, *relaxavi*, &c.—to which words, others were ſometimes joined, ſuch as *abjuravi*, *foriſjuravi*, *foriſaffirmavi*, &c. upon a charter of releaſe, ſeiſin has been delivered to the releaſee, or an act done that was like giving ſeiſin.—See further in *Mad. Form. Angl.* Diſſert. p. 19.

(3) See accordingly 1 *Wood* 696.—and more amply as to releaſes expreſs and implied, how and in what manner they are reſpectively created, in *Bac. Abr.* Releaſe (A.) and (B.)—*Com. Dig.* Releaſe (A.)

enure by way of *mitter le droit* only, *i. e.* by way of giving, transferring and diſcharging of a right title or entry unto him to whom it is made. And ſo it doth ſometimes perfect an eſtate that was imperfect and defeaſible before, and enure by way of entry and feoffment. And ſometimes alſo it doth enure to make a conditional eſtate abſolute. And ſometimes alſo it doth work and enure by way of extinguiſhment or diſcharge: and then alſo ſometimes it doth enure by way of diſcharge or extinguiſhment as againſt all perſons, and alſo as that whereof all perſons may take advantage. And ſometimes it doth enure only as a diſcharge againſt ſome perſons only, and as to or againſt other perſons by way of *mitter le droit*. And ſome of theſe in deed enure by way of extinguiſhment; for that he to whom the releaſe is made cannot have the thing releaſed. And ſome of them have ſome quality of ſuch releaſes, and are ſaid to enure by way of extinguiſhment, but in truth do not; for that he to whom the releaſe is made, may receive and take the thing releaſed. And in ſome caſes alſo a releaſe, like a confirmation, doth enure by way of abridgment. But a man cannot bar himſelf hereby of a right that ſhall come to him hereafter. And therefore it is held that theſe words uſed in releaſes [*quæ quoviſmodo in futuro habere potero*] are to no purpoſe.

Co. 10. 48. ſuper Lit. 268. 269. 266.

4. What things may be releaſed: or not: and how.

Lands, tenements and hereditaments themſelves may be given and transferred by way of releaſe; and all rights and titles to lands may be given, barred, and diſcharged by releaſe; and ſo alſo may rights and titles to goods and chattels. Alſo all actions, real, perſonal and mixt, may be given, diſcharged or extinct by releaſe; for howſoever rights and titles of entry cannot be granted by act of the party; nor may any action be granted from one man to another by act of the law or the party; yet all theſe may be releaſed to the terre-tenant. And a right to a free-hold or inheritance, ſeigniory, or rent, *in preſenti* or *futuro*, may be releaſed five manner of ways, and the firſt three ways without any privity at all. 1. To the tenant of the free-hold in deed or in law. 2. To him in the remainder. 3. To him in reverſion. The other two ways in reſpect of privity without any eſtate or right, as by demandant to vouchee, donor * to donee after the donee hath diſcontinued.

* P. 322.

Bro, Releaſe in toto.

Alſo conditions annexed to eſtates, powers of revocation of uſes, warranties, covenants, tenures, ſervices, rents, commons and other profits to be taken out of lands, may be diſcharged, extinguiſhed and determined by releaſe to the tenant of the land, *&c.*

Co. 10. 47. 51. 52. 5. 70. 71. ſuper Lit. 265. Lit ſect. 446. Co. 1. 111. 111. Dier 57. Co. 1. 113. 174.

Alſo poſſibilities of land, *&c.* if they be near and common poſſibilities, albeit they be not grantable over to another perſon, yet may they be releaſed to him that hath the preſent eſtate of the land. And therefore if a man poſſeſſed of a term deviſe it to *A.* for life, the remainder to *B.* and his heirs males during the term; in this caſe, albeit *B.* may not grant his intereſt over, yet he may releaſe it to *A.* And if *A.* deviſe to *B.* twenty pounds when he comes to the age of twenty-four years, and die, in this caſe *B.* after he is of the age of twenty-one years, may releaſe this legacy.

So a covenant to do a future act may be releaſed before it be broken. And it ſeems alſo the conuſee of a ſtatute or recogniſance may releaſe to a feoffee of part of the land, and ſo bar himſelf

himſelf of execution of that land. And if I grant to *I. S.* that if he do ſuch a thing he ſhall have an annuity of twenty pounds for his life; in this caſe, it ſeems *I. S.* may releaſe this before the condition be performed.

And if I make a feoffment to *I. S.* to divers uſes, with power to revoke it; I may releaſe this power to one that hath an eſtate of freehold in poſſeſſion, reverſion or remainder, in the land. And yet if I make a feoffment to *I. S.* with proviſo, that if *B.* revoke, the uſes ſhall ceaſe; in this caſe, *B.* cannot releaſe this power. And a remote poſſibility, that is altogether incertain, cannot be releaſed. And therefore if the ſon of the diſſeiſee releaſe to the diſſeiſor in the life-time of his father; this releaſe is void. And ſo if the conuſee of a ſtatute releaſe his right to the land of the conuſor before execution; this releaſe is void. And ſo if a plaintiff releaſe to a bail in the King's-Bench before judgment given, this releaſe is void (1).

So if one promiſe to pay me ten pounds upon the ſurrender of my land to him, and that if he ſhall ſell it for above fifty pounds that then he ſhall pay me ten pounds more, and I releaſe this to him before he do ſell it, and before I do ſurrender; in this caſe, this doth not releaſe the ſecond promiſe, becauſe it is not releaſable. Adjudged Tr. 14 Jac. B. R.

Alſo debts, legacies, and other duties may be releaſed and diſcharged thereby before or after they become due. And therefore a rent or annuity may be releaſed before the day of payment, and ſo alſo may a debt due by obligation, judgments, executions, recognizances, and the like, by apt words be diſcharged by releaſe. See infra.

* P. 323.

5. How and after what manner theſe things may be releaſed.

* If the charge or duty grow by record the diſcharge and releaſe thereof muſt be by record alſo. And if it grow by writing, the diſcharge and releaſe muſt be by writing alſo. *Nihil eſt magis rationi conſentaneum quam eodem modo quodque diſſolvere quo conſtatum eſt.* And therefore a duty growing by a verbal agreement may in ſome caſes be releaſed by word without writing. But regularly lands and tenements cannot be given, nor rights and titles to lands, and actions be diſcharged by releaſe without a deed in writing.

Condition. Defeaſance.

A releaſe that doth enure by way of *mitter le eſtate*, *mitter le droit*, or extinguiſhment, may be made upon condition, or with a defeaſance, ſo as the condition or defeaſance be contained in the releaſe, or delivered at the ſame time with it: for no defeaſance made after can avoid the force of a releaſe made before. And yet a releaſe may be delivered as an eſcrow, and ſo the force of it may be ſuſpended for a time. But a releaſe of a condition may not be made upon a condition. Nor may a releaſe of a chattel be upon a condition ſubſequent, but it may be upon a condition precedent. And therefore if a man releaſe a debt to another upon condition that the releaſor may have Co. ſuper Lit. 274. Perk. ſect. 718. Lit. 467. Co. 1. 111. 21 H. 7. 24. Curia B. R. Hil. 9. Car. Barkley & Perk's caſe.

(1) It is ſaid to be a general rule that a meer poſſibility cannot be releaſed; and the reaſon thereof is, that a releaſe ſuppoſeth a right in being; and it was thought to countenance maintenance, to transfer choſes in action, poſſibilities and contingent intereſts.—10 *Co.* 48. a.—*Cro. Eliz.* 552.—but note the diſtinction made in 10 *Co.* 48. between a grant or aſſignment of poſſibilities and choſes in action to a ſtranger, and a releaſe of rights, titles and actions to the terre-tenant.—A poſſibility cannot be releaſed; as money to be paid on the birth of the next child, which may never happen; and becauſe it is no debt or duty, it cannot be diſcharged, *Brownl.* 109. *Neal* and *Sheffield.*—*Yelv.* 192. S. C.—See further how far a poſſibility or contingent intereſt may be releaſed, in *Bac. Abr.* Releaſe (H).

Dier 307. 21 H. 7. 24. Co. ſuper Lit. 274. Lit. ſect. 467.

ſuch a debt owing from a third perſon to the releaſee; this is a good condition.

A releaſe of all actions may be made until a time paſt, as until the firſt of *May* laſt, or until the day of the date of the releaſe: and this will diſcharge all actions till then, and none after. But a releaſe cannot be made of a right or action for a part of an eſtate or for a time only, as for one year, or until *Michaelmas* next, or the like: for a releaſe of ſuch a thing for one day, or for one hour, is a releaſe of it for ever. And yet a man may releaſe his right in a part of the land. And therefore if a man be diſſeiſed of two acres, he may releaſe his right in one of them, and enter into the other acre. Alſo a releaſe, in the nature of an acquittance, may be of part of a debt. And therefore if one be bound in an obligation of four hundred pounds, to pay two hundred pounds at *Michaelmas*, and at *Chriſtmas* after the obligee by his deed releaſed three hundred ninety pounds parcel of the ſaid four hundred pounds; this is a good releaſe for ſo much, and no more.

Adjudged Berkley & Perk's caſe. Hil. 9 Car. B. R.

In every good releaſe in deed, howſoever it enure, theſe things are requiſite. 1. That there be a good releaſor, and a good releaſee, and a thing to be releaſed. 2. That the deed be well ſealed, delivered, &c. And if it tend and enure by way of enlargement of eſtate, then theſe things are further required to make the releaſee good. 1. He that doth make the releaſe, muſt have ſuch an eſtate in himſelf, as out of which ſuch an eſtate may be derived and granted to the releaſe, as is intended by the releaſe: * as if he have the reverſion in fee of lands, he may releaſe to a tenant for years, and thereby encreaſe his eſtate to an eſtate for life or in tail, or he may paſs his whole fee-ſimple by the releaſe. But if there be leſſee for years rendring rent, and the reverſion is granted for life, the remainder over in fee, and the grantee of the reverſion releaſe all his right to him in remainder, and then he in the remainder grant the reverſion, and the tenant for life releaſe to the grantee alſo; in this caſe, it ſeems both theſe releaſes are void, and cannot enure as releaſes, howbeit it may be if they have words of ſurrender in them, they may enure as ſurrenders. So if there be leſſee for years, the remainder in tail, the remainder in fee; and the leſſee for years, being a woman, doth marry with him in the remainder in fee, and he in remainder in tail releaſe to him in remainder in fee; this is a void releaſe. So if tenant for life releaſe to him in remainder in fee or in tail; it ſeems this is void, and cannot enure as a releaſe. So if there be tenant for life, the remainder in tail, the remainder in fee, and he in remainder in fee releaſe to the tenant for life; this will not increaſe his eſtate. And if the tenant in tail in this caſe releaſe to the tenant for life; his eſtate ſhall be no longer increaſed hereby than for the life of the tenant in tail.

Dier 251.

Per Juſtice Jones, 5 Car. Dier idem,

Adjudged Trin. 5 Jac. B. R. Butler's caſe.

Lit. ſect. 598. Plow. 556. Co. ſuper Lit. 345.

2. He to whom the releaſe is made, muſt have ſome eſtate in poſſeſſion in deed or in law, or in reverſion in deed, in his own or anothers right, of the lands whereof the releaſe is made, to be as a foundation for the releaſe to ſtand upon: for a releaſe, which muſt enure to enlarge an eſtate, cannot work without a poſſeſſion joined with an eſtate. And therefore the releaſee muſt be leſſee for life, years, or tenant by ſtatute merchant, ſtaple, or elegit, or as guardian in chivalry, that doth hold the land over for the value; or at leaſt he muſt be tenant at will. And therefore if a man let his land to another for term of years, to begin preſently, and after the leſſor or his

Co. ſuper Lit. 270. 273. 265.

Lit. ſect. 459. Plow. 423. Dier 4. 15 H. 7. 14.

6. What releaſes may be made of lands or tenements: and what ſhall be ſaid a good releaſe in deed: or not: and by what words it may be made.

1. When it doth enure by way of inlargement or paſſing of an eſtate.

1. In reſpect of the eſtate of the releaſor.

* P. 324.

Surrender.

2. In reſpect of the eſtate of him to whom the releaſe is made.

heir doth releaſe to the leſſee (after his entry and being in poſſeſſion) all his right in the land; this is good to enlarge the eſtate according to the time ſet down in the releaſe; but if the releaſe be before the term begin; or after the term begin, and before the leſſee have entered; (howſoever if any rent be reſerved on the leaſe it may enure and be good to extinguiſh that rent) yet it is not good to enlarge the eſtate. And yet if a tenant for twenty years in poſſeſſion, make a leaſe to *B.* for ten years, and *B.* enter, and he in the reverſion releaſe to the firſt leſſee for years; this is a good releaſe to enlarge the eſtate. So if a man make a leaſe for years, the remainder for life or years, and the firſt leſſee doth enter; in this caſe, a releaſe to him in remainder is good to enlarge the eſtate. So if I grant the reverſion of my tenant for life to another for life, and after releaſe to him and his heirs; this is a good releaſe to enlarge the eſtate.

* P. 325. * So if a man make a leaſe for life, or years, to a feme ſole, and ſhe take a huſband, and he in the reverſion releaſe to the huſband and his heirs; this is a good releaſe to enlarge the eſtate according to the words of the releaſe. But if the caſe be ſo that a man had an eſtate in poſſeſſion of land, and he be now out of the poſſeſſion of it, and have but a right only to it; or if he have a poſſeſſion only and no eſtate; or if he have neither eſtate nor poſſeſſion; in theſe caſes, a releaſe made to ſuch a one will not avail to enlarge his eſtate. Co. ſuper Lit. 273.

And therefore if a man make a leaſe for life, the remainder for life, and the firſt leſſee dieth, and the leſſor releaſe to him in remainder for life, before his entry; this is a good releaſe to enlarge his eſtate, for he hath an eſtate of freehold in law, capable of enlargement by releaſe before entry. But if there be leſſee for life, the remainder for life, the remainder in tail, the remainder in fee, and the leſſee for life is diſſeiſed, and during the poſſeſſion of the diſſeiſor, he that hath right doth releaſe to one of them in the remainder; this is void. So if lands be given in tail or leaſed for life, and the donee or leſſee is diſſeiſed, and, during the poſſeſſion of the diſſeiſor, the donor or leſſor doth releaſe all his right to the donee or leſſee; this is void, and will not enlarge his eſtate: howbeit if there be any rent reſerved on the eſtate, it will extinguiſh the rent. So if the tenant by the curteſy grant over his eſtate, and after he in reverſion doth releaſe to the tenant by the curteſy; in this caſe, his releaſe is void, and will not enlarge his eſtate. So if an infant make a leaſe for life, and the leſſee granteth the eſtate over with warranty, and the infant at full age doth bring a *Dum fuit infra ætatem*, and the tenant doth vouch the grantor, who doth enter into the warranty, and the demandant, being the infant, doth releaſe to him and his heirs; this will not enlarge his eſtate; for in truth he had no eſtate before, and that which is not, cannot be enlarged: and if leſſee for life, or years, releaſe to him in remainder or reverſion; this cannot be good as a releaſe: howbeit if there be apt words, it may amount to a ſurrender. And if a man have only an occupation of land as tenant at ſufferance, as when a leſſee for years doth hold over his term, or the like; no releaſe to him can work any enlargement of eſtate: for albeit he have a poſſeſſion, yet hath he no eſtate; and beſides in this caſe there is no privity, which is the third thing required in theſe releaſes. For as in all theſe releaſes that enure by way of increaſe or paſſing an eſtate, there muſt be ſome eſtate in the releaſor and the releaſee, ſo there

Co. ſuper Lit. 270.

Lit. ſect. 451.

Lit. ſect. 455. 456.

Co. ſuper Lit. 273.

Dier 251.

Co. ſuper Lit. 271. Lit. ſect. 461.

Co. ſuper Lit. 196. Lit. ſect. 461.

3 In reſpect of privity.

there muſt be ſome privity in eſtate between them at the time of the releaſe made; for an eſtate without privity is not ſufficient. And therefore it muſt be, between donor and donee, leſſor and leſſee, * and the like; as in the caſes before, between him in reverſion and the leſſee for life or years, tenant by ſtatute merchant or ſtaple, or by elegit, or guardian in chivalry, that keepeth the land for the value. And if tenant for life leaſe for years, and he in the reverſion and the tenant for life do join together and releaſe to the leſſee for years; this is a good releaſe to enlarge the eſtate. So if he in reverſion releaſe to the huſband that hath an eſtate in the right of his wife only for life or years; this is a good releaſe. So if leſſee for years make a leaſe of the land but for part of the term, the privity continueth ſtill, and therefore a releaſe to him is good to enlarge the eſtate. But if he aſſign over all the term, then the privity is gone, and therefore a releaſe made to him afterwards is void: and then a releaſe, made to the aſſignee of the term, is good to enlarge the eſtate. And if a diſſeiſor make a leaſe for life or years, and after he and the diſſeiſee join together to make a releaſe to the leſſee for life or years; this is a good releaſe to enlarge the eſtate. But if the diſſeiſor in this caſe make a leaſe for life or years, and the diſſeiſee, or he that hath right, releaſe to the tenant for life or years; in this caſe, the releaſe is void for want of privity. And if there be leſſee for years, the remainder for life, and he in reverſion releaſe to the leſſee for years or to him in remainder for life, and his heirs, all his right; this is a good releaſe to work an enlargement of eſtate. So if one make a leaſe for life, and grant the reverſion for life, and then the leſſor doth releaſe to the grantee of the reverſion and his heirs; this is a good releaſe to enlarge the eſtate of the grantee, and here is privity enough. If *A.* be tenant for life, the remainder to *B.* in tail, the remainder to *C.* for life, the remainder to *A.* in fee, and *A.* die, and his heir doth releaſe all his right to *B.* being in poſſeſſion; this is a good releaſe, and gives the fee-ſimple.

Plow. 541.

Co. ſuper Lit. 273.

Dier 41 Co. 3. 22.

Plow. 540. 14 H. 7. 4. Lit. ſect. 518.

Co. ſuper Lit. 273.

Bro. Releaſe 71.

But if *A.* make a leaſe to *B.* for life, and the leſſee maketh a leaſe for years, and after *A.* in the life-time of the tenant for life maketh a releaſe to the leſſee for years; this releaſe is void, and will not enlarge his eſtate, for want of privity. So if a man make a leaſe for twenty years, and the leſſee make a leaſe for ten years, and the firſt leſſor doth releaſe to the ſecond leſſee and his heirs; this releaſe is void. So alſo if the donee in tail make a leaſe for his own life, and the donor releaſe to the leſſee and his heirs; this releaſe is void. So alſo if the donee in tail make a leaſe for his own life, and after the donor releaſe to the donee and his heirs; it ſeems this is not a good releaſe. Alſo one joint-tenant or coparcener may releaſe to another, and thereby transfer all his eſtate and give the whole intereſt unto his companion; and this is a good releaſe to paſs all his or her part of the land. And if there be three joint-tenants * in fee, and they make a leaſe for life, and after two of them releaſe all their right in the land to the third, this is a good releaſe (1). So if one make a leaſe for life to another, and after

Co. ſuper Lit. 273. Lit. ſect. 516.

Bro. Releaſe 77. Perk. ſect. 84.

* P. 326.

* P. 327.

(1) A releaſe being the proper mode of conveyance from one joint-tenant to another; and ſuch joint-tenant not being capable of making a feoffment to his companion: ſee before in page 201, and note 3 thereto.—If one joint-tenant *grants, bargains, and ſells*, or *gives, grants, and confirms* his eſtate unto his companion, either of theſe will operate as a releaſe. 1 *Vent.* 78.—1 *Sid.* 452.

he grant the reverſion to ſeven, and the tenant for life doth attorn, and after four of the ſeven releaſe all their right to the other three, and after one of the three releaſe to the other two; theſe are good releaſes. So if a leaſe for years be made to two, to begin at a day to come, a releaſe by one of them to the other is good to give all the term and all the land to the releaſee. But it ſeems one tenant in common cannot releaſe to another tenant in common (1). 10 H. 4. 3.

4. In reſpect of the words whereby it is made.

The fourth thing that is required in ſuch a releaſe is, ſufficient words in law not only to make a releaſe, (which is required in all releaſes) but alſo to raiſe and create a new eſtate. For this therefore know, that all releaſes (of what kind ſoever) are commonly made by theſe words, *remiſiſſe, relaxaſſe, & quietum clamaſſe*, as being the moſt ancient and ſignificant words to this purpoſe. And amongſt theſe the word *releaſe* is the moſt effectual word, as that which doth include the other two, and as that which is the proper and peculiar word for this kind of conveyance. But there are other words alſo by which a releaſe may be made, as *renunciare, acquietare, &c.* And therefore it is held that if one have common in another's land, and he by deed releaſe it to him thus, *Renuntio communiam meam, &c.* this is a good releaſe. And if the leſſor do but grant to his leſſee for life that he ſhall be diſcharged of the rent, this is a good releaſe of the rent. And it is a rule, that by what words a debt or duty may be created, by words of a contrary ſignification it may be releaſed. And therefore if one do acknowledge himſelf to be ſatisfied and diſcharged a debt, this is a good releaſe of the debt (2). And for words to raiſe the eſtate, it is uſual and moſt ſafe to ſpecify in the deed what eſtate he to whom the releaſe is made ſhall have; and in moſt caſes this is needfull: for it is generally true, that when a releaſe doth enure by way of enlargement of eſtate, no inheritance in fee-ſimple or fee-tail can paſs without apt words of inheritance. And therefore if I make a leaſe of land to another for his life, and after I releaſe to him all my right without more ſaying in the releaſe; hereby his eſtate is not enlarged. But if I releaſe to him and his heirs; by this he hath a fee-ſimple. And if I releaſe to him and the heirs of his body; by this he hath an eſtate tail. But where a releaſe worketh by way of *mitter le eſtate*, there in ſome caſes there need not any words of inheritance; as in caſes where releaſes are made between joint-tenants or coparceners; as where a joint eſtate is made to the huſband and wife, and a third perſon and their heirs, and the third perſon doth * releaſe all his right to the huſband alone, or to the wife alone. 4) Co. ſuper Lit. 273. 302.

* P. 328.

So if there be three joint-tenants, and one of them doth releaſe to one of the other two; in all theſe, and ſuch like caſes, there needs not any limitation of the eſtate, for the releaſe is good without it (3). 9 H. 6. 35. Dier 116. Lit. ſect. 544. Co. ſuper Lit. 264. Dier 307. Co. 9. 52. Co. ſuper Lit. 273. Lit. ſect. 465. 468. 469.

(1) But they muſt paſs their eſtate by feoffment, &c. becauſe this eſtate being eſtabliſhed by different notorieties, each having paſſed by diſtinct liveries, they muſt paſs to each other by a diſtinguiſhing livery; or elſe it cannot be known, in whom ſuch parts are, which formerly had paſſed by a diſtinct livery.

(2) See more amply, by what words a releaſe may be made, in *Vin. Abr.* Releaſe (L.)

(3) See more amply, as to releaſes which enure by way of enlargement of the eſtate, in *Com. Dig.* Releaſe (C.)—*Vin. Abr.* Releaſe (B.)—*Bac. Abr.* Releaſe (C. 4.) and therein of the modern manner of conveyancing by *leaſe and releaſe*; for which, ſee alſo the note at the end of chapter 9. on Feoffment.

Lit. ſect. 466. Co. ſuper Lit. 265. Co. 5. 70. 71. 1. 111. 3. 151.

In every good releaſe in deed, that doth tend and enure to give, diſcharge, or extinguiſh any right or title of lands, it is alſo further requiſite,

2. When it doth enure by way of paſſing and extinguiſhment of a right or title only.

1. In reſpect of the eſtate of the releaſor.

1. That he that doth make it hath, at the time of the releaſe made, ſome right or title to releaſe. As where one doth diſſeiſe me of land, and I releaſe to him all my right in the land; this is a good releaſe. So if one diſſeiſe my tenant for life, and I (being the next in remainder, or reverſion in fee) do releaſe to him that did make the diſſeiſin; this is a good releaſe. So if the huſband make a leaſe for life, and then take a wife and dieth, and the wife releaſe her dower to him in reverſion; this is a good releaſe. And ſo alſo if after the marriage a man make a leaſe for life, the remainder in fee, and ſhe releaſe all her right to him in remainder in fee, or to him in reverſion; this is a good releaſe, and will bar her for ever.

Lit. ſect. 446. Co. 10. 47. 42. ſuper Lit. 265.

But if the releaſor have only a poſſibility of a right, or if a right happen to come to him after the releaſe, this is not ſufficient to make the releaſe good. And therefore if the father be diſſeiſed, and the ſon before his father's death releaſe all his right to the diſſeiſor, and after the father dieth, ſo that the right doth deſcend; this is no good releaſe to bar the releaſor of his right. So if there be grandfather, father, and ſon, and the father diſſeiſe the grandfather, and make a feoffment, and the ſon releaſe in the life-time of his father, and after the father and grandfather die; this releaſe in this caſe will not bar him. So if a leaſe be made for life, the remainder to the right heirs of *I. S.* and the leſſee is diſſeiſed, and the eldeſt ſon of *I. S.* living his father, doth releaſe to the diſſeiſor; this releaſe is void. So if the conuſee of a ſtatute, *&c.* do releaſe to the conuſor all his right in the land; this is void, and he may ſue execution after notwithſtanding. Or if the releaſor have only a power, this is not ſufficient to make the releaſe good. And therefore if a man by his will deviſe that his executors ſhall ſell his land, and dieth, and the executors releaſe all their right and title in the land to the heir; this is void.

Co. 10. 57. Co. 5. 70. Co. ſuper Lit. 265.

Co. ſuper Lit. 267.

2. In all caſes of a releaſe of a bare right of a freehold in lands or tenements, he to whom the releaſe is made, muſt at the time of the making thereof in any caſe have the freehold (in deed or in law) in poſſeſſion or ſome eſtate in remainder or reverſion (in deed and not in right only) in fee-ſimple, fee-tail, or for life, of the lands * whereof the releaſe is made: for rights of entry, and actions, and the like, are not to be transferred to ſtrangers, but are thus to be releaſed, and ſuch releaſes are good. As if the diſſeiſee releaſe to the diſſeiſor himſelf who hath the freehold in deed, or to the heir of the diſſeiſor who hath the freehold in law, before his entry, or to the leſſee for life of the diſſeiſor; theſe releaſes are good. So if a diſſeiſor make a leaſe to *A.* and his heirs during the life of *B.* and *A.* die, and the diſſeiſee releaſe to his heir before his entry; this is a good releaſe.

2. In reſpect of the eſtate of him to whom the releaſe is made.

* P. 329.

Co. ſuper Lit. 266. 275. Lit. ſect. 448. 1 H. 6. 4. Dier 302.

So if a fine *ſur conuſance de droit come ceo, &c.* or *ſur conuſance de droit* only (which is a feoffment on record) be levied; or if tenant for life, by agreement of him in the reverſion, ſurrender to him in the reverſion; or if a man do bargain and ſell his land by deed indented and inrolled; or uſes are raiſed by covenant on good conſiderations; in all theſe caſes, the conuſee, he in reverſion, bargainee, and *ceſtuy que uſe*, have a freehold in law in them before entry. And therefore a releaſe

to them of the right of the land by him that hath it, is good, and will bar the releasor. But otherwise it is in cases of exchange, partition, or upon livery within the view; for, in these cases, no release is good until an actual entry made, for till then they have neither freehold in right nor law. So if a disseisor make a gift in tail, or lease for life or years, of the land, and keep the reversion, and then the disseisee or his heir release to the disseisor all his right; this is a good release to bar his right for ever. So if the heir of the disseisor be disseised, and the first disseisee do after release to him all his right; this is a good release to bar him. So if a donee in tail discontinue in fee, and the donor release to the discontinuee and die; this is a good release against the donor. So if the donee in tail be disseised, and after the donor release to the donee all his right, this is good: but in this case nothing of the reversion will pass by the release: for the donee had then nothing but a right. But if any rent be reserved on the estate tail, the rent is gone by the release. So if a lease be made to one for life rendring rent, and the lessee is disseised, and the lessor release to the releasee and his heirs all his right; in this case, albeit the rent be extinct, yet nothing of the right of the reversion doth pass. And yet if a woman that hath right of dower release to the guardian in chivalry; this is a good release, and her right or title of dower is gone. But if a disseisor make a lease for years, and the disseisee release to the lessee for years; this release is void, because he hath no freehold. But if he make a lease for life, and the disseisee release to the lessee for life, this is a good release. So also a release to the disseisor after the lease for years made, is good. And if lessee for years be ousted, and he in the reversion disseised, and * the disseisor make a lease for years, and the first lessee release to him; this is a good release. Also in some cases a release made to one that hath neither freehold in deed, nor freehold in law, is good, when he hath an estate in reversion or remainder; as in the case before, where a release is made by the disseisee to the disseisor after he hath made an estate for life. So if the demandant in a real action release to the tenant that comes in by receipt upon a prayer of aid or voucher upon a warranty; this is good. And yet if it be before the receipt, or entry into the warranty, or it be by any other besides the demandant, it is void. So if the tenant in a real action alien, hanging the *precipe quod reddat* against him, and after alienation the plaintiff release all his right in the land to him, this is a good release. So if a disseisor make a lease for life, the remainder to another for life, the remainder to a third in tail, the remainder to a fourth in fee, and the disseisee release to either of them in remainder; this is a good release. But if in this case tenant for life be disseised, and after he that hath right (the possession being in the disseisor) doth release to either of them in remainder; this is a void release. But in all the cases of a release of a bare right to him that hath an estate of a freehold in deed or in law, generally there needs no privity to make the release good: as in the cases before of a release made to the tenant for life of the disseisor, and them that follow. For if tenant for life make a lease to another for life of the lessee, the remainder over in fee, and the first lessor release all his right to him to whom the tenant made the lease for life; this

Extinguishment.

* P. 330.

3. In respect of privity.

Litt. sect. 449.

Co. super Litt. 265. Litt. sect. 455, 456.

Co. super Litt. 265.

Litt. sect. 448, 449. 450, 451. Co. 8. 151.

Co. super Litt. 275. Litt. sect. 470, 471. Co. 10. 48.

this is a good releaſe and perpetual bar, albeit the releaſe be not to him and his heirs. And ſo it is in caſe of a reverſion.

If leſſee for years be ouſted, and he in the reverſion diſſeiſed, and the diſſeiſor make a leaſe for years, and the leſſee that is ouſted doth releaſe to the leſſee of the diſſeiſor, this is a good releaſe. And yet if the diſſeiſee do releaſe to the leſſee for years of the diſſeiſor, this is void.

If leſſee for a thouſand years be ouſted by the leſſor, and he make a leaſe for two years, and the leſſee for a thouſand years releaſe unto him, this is a good releaſe. But if a leſſor diſſeiſe his leſſee for life, and make a leaſe for a thouſand years, and the leſſee for life releaſe to this leſſee of a thouſand years, this is void.

Co. ſuper Lit. 277. Lit. ſect. 473. 470. 471. 478. If one be diſſeiſed, and after another doth diſſeiſe him, and the diſſeiſee releaſe to the laſt diſſeiſor, this is a good releaſe. So if *A.* diſſeiſe *B.* who infeoffeth *C.* with warranty, who infeoffeth *D.* with warranty, and *E.* diſſeiſeth *D.* to whom *B.* the firſt diſſeiſee releaſeth; this is a good releaſe, and doth defeat all the mean eſtates and warranties. So if my diſſeiſor leaſe for life, and the leſſee for life alien in fee, and I releaſe to the alienee all my right, *&c.* this is * a good releaſe and will bar me of my entry: but if my entry be gone, as if I leaſe for life, and my leſſee be diſſeiſed, and that diſſeiſor is diſſeiſed, and I releaſe to the ſecond diſſeiſor; in this caſe, the firſt diſſeiſor may enter upon the ſecond. So if my diſſeiſor, in the caſe aforeſaid, make a leaſe for life, and the leſſee for life maketh a feoffment to two, and I releaſe to one of the feoffees; this is a good releaſe, and will bar me and my diſſeiſor alſo. So if tenant for life let the land to another for the life of the leſſee, the remainder to another in fee, and the leſſor releaſe to his tenant for life; this is a good releaſe. * P. 331.

If one that hath a ſon within age be diſſeiſed and die, and the diſſeiſor die ſeiſed, and the land deſcend to his heir, and a ſtranger abate, to whom the ſon when he comes of age doth releaſe; this is a good releaſe. So if one be diſſeiſed by an infant which doth alien in fee, and the alienee die ſeiſed, and his heir entreth, the diſſeiſor being within age, and the diſſeiſee releaſe to the heir of the alienee; this is a good releaſe.

9 H. 6. 43. But where an inheritance or an eſtate for life is releaſed to one that is but tenant for years, the releaſe is not good without

Co. 10. 48. privity. And therefore if tenant for life, or in fee, releaſe to the leſſee for years of his diſſeiſor; this is not good. But the releaſe of a term of years to the leſſee for years of him that doth eject him is good enough without privity, as in the caſe before.

Co. ſuper Lit. 265. But here note, that in caſes of a void releaſe of a right to an inheritance or free-hold, where there is a warranty contained in the deed, the warranty may be good, and be uſed by way of rebutter, albeit the releaſe be void. As if the ſon of the diſſeiſee releaſe with warranty in the life-time of his father; or if there be grandfather, father and ſon, and the father diſſeiſe the grandfather, and make a leaſe with warranty and die; in both theſe caſes, albeit the ſon be not barred by the releaſe, yet he is barred by the warranty. Warranty.

Co. ſuper Lit. ſect. 467. 4. Such words as will make a good releaſe in the caſes of releaſes that enure by way of enlargement of eſtate, will make a good releaſe in theſe caſes. And note that this kind of releaſe 4. In reſpect of the words whereby it is made.

leaſe is good without any limitation or ſpecifying of the eſtate; for by a releaſe of all a man's right without ſaying to have and to hold to him and his heirs, &c. in all the caſes before, he that makes the releaſe is barred of his right for ever; for if I be ſeiſed of an eſtate in fee by wrong, and he that hath right releaſe to me all his right, albeit it be but for one hour, yet this is a good releaſe for ever.

7. What releaſes may be made of other things: and what ſhall be ſaid a good releaſe in deed of ſuch things: or not: and by what words.

Of a ſeigniory, rent-ſervice, common, or the like.

* P. 332.

If there be Lord and tenant, and the Lord releaſe to the tenant all his right that he hath in the ſeigniory, or all his right that he hath in the land, &c. this is a good releaſe to extinguiſh the * ſeigniory. And in this caſe there needs no words of inheritance or limitation, for by a releaſe of all the right in the ſeigniory, the ſame is extinct for ever, without ſaying [to him and his heirs.] And yet in this caſe the Lord may by apt words releaſe his ſeigniory to the tenant only in tail, or for life, and it ſhall be good ſo long. But if a Lord grant to his tenant, that he ſhall do his ſuit to another manor of the Lord's; or that the tenant ſhall give him yearly twelve-pence for his ſuit; this grant will not extinguiſh and determine the ſervices or tenure. Lit. ſect. 480. Co. ſuper Lit 380. 305. Perk. ſect. 70.

If there be Lord and tenant, and the tenant be diſſeiſed, and after the Lord releaſe all his right, &c. to the tenant; by this releaſe the ſervice or ſeigniory is extinct: for albeit a right regularly cannot be releaſed to him that hath but a bare right, yet a ſeigniory may be releaſed and extinct to him that hath but a bare right in the land. But if the tenant make a feoffment in fee, and then the Lord releaſe all his right, &c. to the tenant; this is not good to extinguiſh the ſeigniory or ſervices, but it will diſcharge all the arrearages. Lit. ſect. 457. Co. 10. 58. ſuper Lit. 268.

If a rent-charge, common of paſture, or any other profit apprender, be iſſuing out of my land, and he that hath it doth releaſe it to me; this is a good releaſe and will extinguiſh it. But if I be diſſeiſed of the land, and have but a right at the time of the releaſe made; the releaſe is not good, as it is in the caſe of a rent-ſervice and a ſeigniory. But if lands be given to me in tail, or for life, rendring rent, and I be diſſeiſed, and after the donor releaſe to me all his right in the land; this is a good releaſe and ſhall extinguiſh the rent. So if in this caſe where I am tenant in tail, and I make a feoffment in fee rendring rent, and after I releaſe to the feoffee; this is a good releaſe, and hereby the rent is extinct. And if two coparceners be of a rent, and one of them take the terre-tenant to huſband, and after either of them releaſe; theſe releaſes will be good (1). Lit. ſect. 480. 356. 357. Co. ſuper Lit. 305. Lit. ſect. 455. 456. Co. ſuper Lit. 273.

If one diſſeiſe me of land, and then grant a rent-charge out of the land, and I, reciting the ſame, grant releaſe to the grantee; this releaſe it ſeems is good, and will bar me ſo, as after my re-entry I ſhall not be able to avoid it. Lit. ſect. 527. Co. ſuper Lit. 300.

Of an advowſon, &c.

If two have the grant of the next advowſon or avoidance of a church, before it be void one of them may releaſe to the other, but afterwards they cannot. Co. ſuper Lit. 270.

Of a condition.

If *A.* make a feoffment in fee, gift in tail, leaſe for life or years to *B.* on condition that upon ſuch a contingent it ſhall be void: in this caſe, *A.* may, before the condition broken, re- Co. 1. 112. Perk. ſect. 823. 764.

(1) In *Co. Lit.* 273. b. it is ſaid, if two coparceners be of a rent, and the one of them taketh the terre-tenant to huſband, the other may releaſe to her, notwithſtanding the rent be in ſuſpence; and it ſhall enure by way of mitter l' eſtate, and ſhe may releaſe alſo to the terre-tenant, and that ſhall enure by way of extinguiſhment.

leaſe

leaſe all his right in the land, or releaſe the condition to *B.* and this will be good to make the eſtate abſolute and to diſcharge the condition. So if a feoffee * on condition make a gift in tail or leaſe for life, and after the feoffor releaſe to the donee or leſſee, this is a good releaſe to diſcharge the condition. So if a copy-holder ſurrender to the uſe of another on condition, and this is preſented to be without condition, and after the ſurrenderor doth releaſe to him to whoſe uſe the ſurrender was made, all his right, &c. this is a good releaſe, and doth extinguiſh the condition. But if a diſſeiſor make a feoffment on condition, and the diſſeiſee releaſe to the feoffee on condition; howſoever this doth bar the right of the diſſeiſee, yet it doth not diſcharge the condition.

* P. 333.

Co. 1. 112. 113. 173. 174.

Where a power or authority is ſuch, that it doth reſpect the benefit of the leſſor, as in the uſual caſes of power of revocation of uſes, when the feoffor, *&c.* hath power to alter, change, determine or revoke the uſes being intended for his benefit, and he releaſe to any one that hath a freehold in poſſeſſion, reverſion, or remainder, by the former limitation; this is a good releaſe, and doth extinguiſh the power, and make the eſtates that were before defeaſible abſolute, and it doth ſeclude him from any power of alteration or revocation. But if the power be collateral, or to the uſe of a ſtranger, and nothing to the benefit of him that makes the releaſe: as if *A.* make a feoffment to *B.* to divers uſes, provided that *B.* ſhall have a power to revoke the uſes, and *B.* releaſe to any one of them that hath a uſe; this doth not extinguiſh the power; as it doth in caſe where the power is given to *A.* and *A.* doth releaſe it.

Of a power of revocation.

Bro. Releaſe 88. 21 H. 7. 29. Co. 5. 27.

If a feoffment be made with warranty, and the feoffee releaſe the warranty; this doth extinguiſh it. And ſo it is of other warranties. But if tenant in tail releaſe the warranty annexed to his eſtate tail, this doth not extinguiſh the warranty.

Of a warranty.

Any man may releaſe any debt or duty due to himſelf. Alſo a man may diſcharge or releaſe any thing due, or any wrong done, to his wife, before or after the marriage (1). And therefore if a treſpaſs were done, or a promiſe were made, to my wife before the marriage, I may at any time during the marriage releaſe this. So if any wrong be done, or obligation, ſtatute, or promiſe made to her alone, or to her and me together, at any time during the marriage; I alone may releaſe and diſcharge this. And if my wife be an executrix to any other man, I may releaſe any debt or duty due to the teſtator.

Of debts and other duties perſonal.
1. In reſpect of the perſons.

Husband and wife.

Per. Ch. Juſtice B. R. Mich. 17 Jac.

And if a legacy be given to a woman ſole to be paid at *Michaelmas* next, and I marry her, and I releaſe the legacy before the day; it ſeems by this, the legacy is gone (2).

Co. 5. 27.

An infant executor may releaſe a debt duly paid unto him of the teſtator's debt. But if he releaſe that which he doth not

Infant.

(1) By the marriage the huſband acquires ſuch an intereſt in all debts due to the wife, that he may releaſe them; and therefore the releaſe of the huſband is a good bar to a debt due before the coverture, *Rol. Abr.* Releaſe (D.)

(2) If huſband and wife be divorced a *menſa et thoro* and a legacy is left to the wife, and the huſband releaſe it, ſhe is thereby barred; for the marriage continues, and the huſband has all her right—*per Holt*, 1 *Salk.* 115.——and in the caſe of *Palmer* and *Trevor*, 1 *Vern.* 261, where a legacy was given to a feme covert who lived ſeparate from her huſband, and the executor paid it to the feme and took her receipt for it, yet on a bill brought by the huſband, it was decreed not to be a good payment.—See further how far the huſband's releaſe ſhall bind his wife, in *Bac. Abr.* Releaſe (F.)—*Vin. Abr.* Releaſe (H.)—*Com. Dig.* Releaſe (E. 1.)

* P. 334.

not * receive, it is a void releaſe (1). And regularly the releaſe of an infant is void (2).

2. In reſpect of the time.

An executor before probate of the will may releaſe a debt or duty due to the teſtator; and this releaſe is good to bar him (3). Co. 5. 27. 9. 39.

A future or contingent promiſe may be releaſed and diſcharged before the contingent happen. Trin. 4 Jac. in Elton's caſe.

A debt on an obligation, or rent, may alſo be releaſed before the day of payment as well as after, but not by the ſame words. And therefore if one promiſe to *I. S.* that upon the ſurrender of *I. S.* he will pay him an hundred and ten pounds, and after the promiſe and before the ſurrender he releaſe this debt; this doth diſcharge the debt. But if the promiſe be that if the ſurrenderee ſhall ſell the land, and ſhall have five hundred pounds, that then he ſhall pay the ſurrenderor an hundred pounds more, and the ſurrenderor before ſale releaſe this ſum; this is no diſcharge of it. And yet a releaſe of the promiſe is a diſcharge of it. And if *A.* promiſe to me, that if *I. S.* do not pay to me an hundred pounds 1 *Octobris*, that he doth owe me, that *A.* will pay me the hundred pounds 1 *Novembris*, and I 10 *Septembris* releaſe to him this debt, or all actions and demands; in this caſe, this releaſe is not good to diſcharge this promiſe. But by a releaſe of the promiſe, the ſame is diſcharged. Hil. 16. Jac. B. R. Briſco verſus Heires.

Of actions.

If a man releaſe to another all actions, and do not ſay further which he hath againſt him; this is as good a releaſe as if theſe words were inſerted: *quod neceſſario ſubintelligitur non deeſt* (4). Bro. Releaſe 29.

And all theſe releaſes muſt be made by apt words, and ſuch as the law ſhall judge ſufficient for that purpoſe. Co. 9. 53.

And in all theſe caſes care muſt be had there be no miſtakes: for miſtakes will make releaſes and confirmations void as well as other grants. And therefore if *A.* make a releaſe to *B.* in this manner; *Noveritis, &c. me* A. *de* B. *remiſiſſe, &c.* B. *omnes actiones quas idem* B. *habet verſus* A. whereas it ſhould be *quas idem* A. *habet verſus* B. this releaſe is void (5). Bro. Releaſe 56. 58.

3. What ſhall be ſaid a releaſe in law: or not: and how.
Of a ſeignory.
Of a right to land.

If there be Lord and tenant, and the Lord purchaſe the tenancy; by this means the ſervices are releaſed and extinct in law. And if the Lord diſſeiſe his tenant, and make a feoffment in fee by deed or without deed; this is a releaſe in law of the ſeigniory. Co. ſuper Lit. 264.

If a diſſeiſee diſſeiſe the heir of the deſſeiſor, and make a feoffment with or without a deed; this is a releaſe in law of the right in fee. And if he make a leaſe for life, this is a releaſe in law of the right, ſo long as the leaſe doth laſt. Co. Idem.

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(1) See accordingly *And.* 117, *Ruſſell* v. *Pratt.* S. C. *Mo.* 146, ſays, that *Plowden* was ſtrong in opinion againſt the judgment, but *Wray* C. J. ſaid to him, "that he had conferred with all the Juſtices of *England* and "they had agreed to give judgment for the infant, becauſe, the releaſe being without conſideration, the infant "would charge himſelf in a *devaſtavit*.—S. C. cited in *Rol. Rep.* 336."

(2) Or voidable: ſee before, with reſpect to deeds made by infants, in page 7, 54, 232, and the references in the notes thereto.

(3) See accordingly in *Plow.* 281.—*Co. Lit.* 292. b. and more amply as to releaſes by executors and adminiſtrators, in *Went. Office of Ex.* 33.—*Bac. Abr.* Releaſe (E.)—*Com. Dig.* Adminiſtration (B. 9.)

(4) A releaſe of all actions, diſcharges a bond to pay money at a certain day to come, for it is *debitum in præſenti, quamvis ſit ſolvendum in futuro*; and albeit no action lieth for the debt, yet becauſe the right of action is in the releaſor, the releaſe of all actions is a diſcharge of the debt itſelf, *Co. Lit.* 292. b.—by a releaſe of all actions, actions real, perſonal, or mixt are diſcharged, *Com. Dig.* Releaſe (E. 3.)—ſee further in *Bac. Abr.* Releaſe (I. 2.)—*Vin. Abr.* Releaſe (P.)

(5) As to miſtakes and miſrecitals in releaſes, ſee *Bac. Abr.* Releaſe (L.) *Vin. Abr.* Releaſe (L. 3).

* If

Co. ſuper Lit. 264. 3 E. 4. 3. 21 E. 4. 2.

* If a creditor, as an obligee, or the like, make a debtor, as the obligor, &c. his executor; by this means the action is releaſed by act of law, and yet the duty remains ſtill, for the executor may retain ſo much of the goods of the teſtator. And if the creditor be a woman, and ſhe marry with the debtor; by this the debt is releaſed in law. And if there be two obligees or debtees, and one of them, being a woman, is married to the obligor; this is a releaſe in law of the debt, albeit the creditor be an infant (1).

* P. 335. Of a right of action. Executor.

M. 30 & 31. El. B. R. Adjudged Co. 8. 136.

But if there be a woman executrix to the debtee, and ſhe take the debtor to the huſband, this is no releaſe in law (2).

And if an obligor be made adminiſtrator of the goods and chattels of the obligee; this is no releaſe in law (3).

Co. 61. 5. 5. 22. Bro. Releaſes 84. 94. ſtat. 23 H. 8. ch. 3.

Where divers join in any ſuit or action to recover any perſonal thing of which they are to have the joint benefit or intereſt, when the law doth not compel them to join, there the releaſe of one of them ſhall bar all the reſt. And therefore if two men join in an action of debt, treſpaſs, or the like, and one of them alone doth releaſe to the defendant; this is a bar to the other plaintiff alſo. So if a ſtatute or an obligation be made to two or more, and one of them releaſe it to the conuſor or obligor; this is a diſcharge of the whole duty, and a bar to the reſt, ſo that they can make no uſe of the ſtatute or obligation. But if divers be charged in an action, and they for the diſcharge of themſelves only join in a ſuit or action, where alſo they can do no otherwiſe, being compelled by law to join; in this caſe, the releaſe of one of them ſhall not hurt the others. And therefore if divers join in a writ of error, attaint, or *audita querela*, and one of them releaſe to the defendant in the writ; this will not bar the reſt of their remedy, but they may go on in their ſuit notwithſtanding.

9. The force and virtue of it: and how it ſhall enure and be conſtrued and taken.
1. In reſpect of the perſons: and where a releaſe made by one ſhall bind another: and where not: and where a releaſe made to one, ſhall enure to another: or not.

16 H. 7. 4.

If there be two or more executors, and one of them alone releaſe a debt or duty to the teſtator before judgement in a ſuit, had by all the executors againſt the debtor, this will bar all the reſt. But otherwiſe it ſeems it is after judgement had.

Executors.

Co. ſuper Lit. 205. Lit. ſect. 452. 470. Co. ſuper Lit. 275. 290. 267. 268. Co. 8. 151.

If a writ of ward be brought by two, and one of them releaſe; this ſhall not bar his companion, but ſhall enure to his benefit; for hereby he ſhall have the whole ward.

A releaſe made to the tenant in tail, or for life, of the right to the land, ſhall avail and enure to him that hath a reverſion or remainder in deed. And ſo *e converſo*, a releaſe made to him that hath a remainder or reverſion will avail and enure to the benefit of him that hath the eſtate tail for life, or years precedent. As if a diſſeiſor make a leaſe for life, and the diſſeiſee * releaſe to the tenant for life; this ſhall enure to the diſſeiſor. So if he, or a tenant for life, make a leaſe for life,

* P. 336.

(1) See accordingly 1 *Salk.* 306.—8 *Co.* 136.—If an infant at the age of ſeventeen years makes his debtor executor, it is a releaſe in law; for as the law gives him power to make an executor, it gives his executor the ſame advantages with others, *Co. Lit.* 264.

(2) Becauſe ſhe hath the debt in another right; and if this amounted to a releaſe in law, it would be a *devaſtavit*, which is a wrong the law will not ſuffer *Co. Lit.* 264.—in *Croſſman* v. *Reade*, *Cro. Eliz.* 114. it was adjudged that by the intermarriage the debt which the executrix had *in auter droit*, was not extinct but ſuſpended, and that after *Baron's* death an action would lie againſt his executor.—A ſimilar diſtinction is made in the law of Merger, where different terms for years happen to veſt in the ſame perſon in different rights.

(3) See accordingly 1 *Wood* 697.—and more amply in what caſes a releaſe by operation of law is created, and the effect thereof, in *Vin. Abr.* Releaſe (L. 2.)—*Bac. Abr.* Releaſe (B.)—*Com. Dig.* Releaſe (A. 2.)

the remainder for life, the remainder in tail, the remainder in fee; and the diſſeiſee or firſt leſſor doth releaſe all his right to any of them in remainder; this ſhall enure unto and benefit all the reſt. And if the huſband make a leaſe of his wife's land to one for life, the remainder to another in fee, and the wife after his death doth releaſe all her right in the land to him in remainder; this ſhall enure to the leſſee for life.

If a diſſeiſor make a leaſe for life, and the diſſeiſee releaſe all his right to the tenant for life; this ſhall enure to the benefit of the diſſeiſor. But if the diſſeiſee releaſe no more to the tenant for life, but all actions; this releaſe will not benefit him in remainder, or reverſion, after the death of the tenant for life. Co. ſuper Lit. 275.

If a diſſeiſor make a feoffment to two in fee, and the diſſeiſee releaſe to one of the feoffees, this ſhall enure to both. Lit. ſect. 472.

If tenant in tail be diſſeiſed by two, and he releaſe to one of them, this ſhall enure to both. But if the King's tenant be diſſeiſed by two, and he releaſe to one of them; this ſhall not enure to the other. So if two joint-tenants make a leaſe for life, and then diſſeiſe the tenant for life and he releaſe to one of them; in this caſe, his companion ſhall have no benefit by it. Co. ſuper Lit. 276.

If tenant in fee-ſimple be diſſeiſed by two, or two do abate or intrude, and he doth releaſe to one of them; the other ſhall have no benefit by this. But if tenant for life do, after a diſſeiſin done to him, releaſe to one of the diſſeiſors, this ſhall enure to both. Lit. ſect. 472, 522.

And if two diſſeiſors be, and they make a leaſe for life, or years, and after the diſſeiſee doth releaſe to one of the diſſeiſors; this ſhall enure to them both, and to the benefit of the leſſee for life alſo. Co. ſuper Lit. 276.

And if leſſee for years be ouſted, and he in reverſion diſſeiſed, and the leſſee releaſe to the diſſeiſor; the term of years is hereby extinct, and the diſſeiſee may take advantage of it and enter preſently.

But if two joint-tenants in fee be diſſeiſed by two diſſeiſors, and one of the diſſeiſees releaſe to one of the diſſeiſors all his right; this ſhall enure to the other, for this extendeth but to a moiety.

If a releaſe be made by a woman of her dower to the guardian in chivalry; this ſhall enure to the heir, and he may take advantage of it. Co. ſuper Lit. 268.

If tenant for life be diſſeiſed by two, and he in the reverſion and the tenant for life join in a releaſe to one of the diſſeiſors; this ſhall not enure to the other. But if they do ſeverally * releaſe their ſeveral rights, their ſeveral releaſes ſhall enure to both the diſſeiſors. Co. ſuper Lit. 276.

* P. 337.

If a mortgagee upon condition, after the condition broken, be diſſeiſed by two, and the mortgagor that hath the title of entry, doth releaſe to the one diſſeiſor; this ſhall enure to both. And like law is for an entry for mortmain, or a conſent to raviſhment, *&c.* Co. idem.

If there be Lord and two joint-tenants, and the Lord releaſe to one of them; this ſhall avail his companion. Co. ſuper Lit. 269.

If tenant in fee-ſimple make a feoffment in fee, and after the Lord releaſe to the feoffor, this ſhall not enure to the feoffee to extinguiſh the ſeigniory. But if he releaſe to the feoffee, this ſhall enure to the feoffor to extinguiſh the ſeigniory.

Co. ſuper Lit. 279. If there be Lord and tenant, and the tenant make a leaſe for life, the remainder in fee, and the Lord releaſe to the tenant for life; the rent is hereby wholly extinguiſhed, and he in remainder ſhall take advantage of it; as when the heir of a diſſeiſor is diſſeiſed, and the diſſeiſor makes a leaſe for life, the remainder in fee, and the firſt diſſeiſee doth releaſe to the tenant for life; this ſhall enure by way of extinguiſhment to him in remainder, *viz.* to the leſſee for life firſt, and after to him in remainder.

Co. ſuper Lit. 267. If two tenants in common of land grant a rent of forty ſhillings out of it, and the grantee releaſe to one of them; this ſhall not enure to the other. But if one be tenant for life of lands, the reverſion in fee to another, and they joyn in the grant of a rent out of the lands, and the grantee releaſe either to the tenant for life, or to him in reverſion; this ſhall enure to the other, and extinguiſh the whole rent.

Co. ſuper Lit. 267. If two men gain an advowſon by uſurpation, and the right patron releaſe to one of them; this releaſe ſhall enure to them both.

Co. 5. 59. ſuper Lit. 232. Lit. ſect. 376. If two be bound jointly and ſeverally in any obligation, or other ſpecialty, and the obligee, *&c.* releaſe to one of them; this ſhall enure to diſcharge the other alſo, if it be a good releaſe as to him that makes it. But otherwiſe it is in caſe of a releaſe made by the King. Prerogative.

And if two do a treſpaſs to another together, and he to whom it is done doth releaſe it to one of them; this ſhall enure to diſcharge the other.

Dier 319. Co ſuper Lit. 273. 276. 14 H. 8. 6. If huſband and wife, and *I. S.* purchaſe to them and the heirs of the huſband, and after *I. S.* releaſe all his right in the land to the huſband; the wife ſhall have no benefit by this, but it ſhall enure to the huſband alone. The huſband and wife.

And if there be two women joint diſſeiſereſſes, and the one take * a huſband, and the diſſeiſee releaſe to the other; in this caſe, the huſband and wife ſhall take no benefit by this. And if the diſſeiſee releaſe to the huſband, this ſhall enure to him and his wife and the other woman. * P. 338.

And if one that hath a rent out of my wife's land releaſe it to me and my heirs; this ſhall enure by way of extinguiſhment, and my wife will have advantage of it. And yet if the words be [grant and releaſe] the rent to the huſband and his heirs, in this caſe the huſband may take as a grant if he will.

Co. ſuper Lit. 232. But here note in all theſe caſes of releaſes, when one man will take advantage of a releaſe made to another, he muſt have the releaſe to ſhew and plead. Note.

Co. 10. 51. 22 H. 6. 1. If I be diſſeiſed, and I releaſe to the diſſeiſor all actions I have or may have againſt him; this is but perſonal, and ſhall not be expounded to bar my heir after my death of his remedy; neither will it bar me of my remedy againſt his heir after his death.

So if I deliver goods to another, and afterwards I releaſe to him all actions, and then he die; by this I am not barred ſo, but I may ſue his executors.

Co. 8. 153. 5. 28. 70. Kelw. 113. Co ſuper Lit. 286. 290. 289. Lit. ſect. 492. 505. 506. 512. 513. Bro. ſtat. 39. See more in *Confirmation, chap.* 18. *numb.* 7.

A releaſe of all actions, without any more words, is better than a releaſe of all actions real only, or a releaſe of all actions perſonal only: for by a releaſe of actions, or a releaſe of all manner of actions, without more words, are releaſed and diſcharged all real, perſonal, and mixt actions then depending, and all cauſes 2. In reſpect of the thing releaſed. Of all actions.

of ſuit for any real or perſonal thing; as appeals for the death of an anceſtor, conſpiracies, ſuits by *Scire facias* to have execution of a judgment, detinue for charters.

And if two conſpire to indict me, and I releaſe to them all actions, and after they go on with their conſpiracy; by this releaſe I am barred to do any thing againſt them. By this releaſe alſo of all actions, a debt due to be paid upon a ſtatute or an obligation at a day to come, albeit the releaſe be before the day, is diſcharged; and by this alſo the ſtatute itſelf if it be at any time before execution is diſcharged.

And if one be to pay forty pounds at four days, and ſome of the days are paſt, and ſome to come, and the debtee make ſuch a releaſe; by this the whole debt is diſcharged.

Alſo in a *Scire facias* upon a fine or a judgment, this releaſe is a good plea in bar.

But this releaſe of all actions will not diſcharge executions, or bar a man of taking out of executions, except it be where it muſt be done by *Scire facias*; neither will it diſcharge or bar a man of ſuits by *audita querela*, or writ of error to reverſe
* P. 339. *an erroneous judgment; neither will it diſcharge covenants before they be broken; nor will it diſcharge any thing for which the leſſor had no cauſe of action at the time of the releaſe made; as if a woman have title of dower, and do releaſe all actions to him that hath the reverſion of the land after an eſtate for life; or a man is by an award to pay me ten pounds at a day to come, and before the time I make ſuch a releaſe; or I make a leaſe rendering rent, or an annuity is granted to me, and, before the rent-day, I make the leſſee or the grantor ſuch a releaſe; in theſe caſes, and by a releaſe in theſe words without more, the dower, debt, rent, or annuity, is not diſcharged.

And if a man have two remedies or means to come by land, as action and entry; or by goods, as action and ſeiſure, or the like; in this caſe, by a releaſe of all actions he doth not bar himſelf of the other remedy. *Et ſic è converſo.* Lit. ſect. 496. 497.

And if a man doth covenant to build an houſe, or make an eſtate, and, before the covenant broken, the covenantee doth releaſe unto him all actions; by this the covenant itſelf is not diſcharged. And yet, after the covenant is broken, this releaſe will diſcharge the action of covenant given upon that breach (1). Co. ſuper Lit. 292.

Of all right. By a releaſe of all a man's right in any lands or tenements, without more words, is releaſed and diſcharged all manner of rights of action, and entry, the releaſor hath to, in, or againſt the land, for there is *jus recuperandi, proſequendi, intrandi, habendi, retinendi, percipiendi, poſſidendi*, and all theſe rights whether they accrue by fine, feoffment, deſcent, or otherwiſe, are extinct and diſcharged; ſo that if the releaſee have gotten into the land of the releaſor by wrong, by this releaſe the wrong is diſcharged, and the releaſee is in the land by good title. Co. 8. 151. Plow. 484. 6 H. 7. 8. Co. 3. 29. 6. 1. ſuper Lit. 345.

Alſo by this releaſe are diſcharged and releaſed all titles of dower, and titles of entry upon a condition or alienation in mortmain.

And if a woman have title of dower after an eſtate for life, and make ſuch a releaſe to him in reverſion, this doth bar her.

(1) See further as to a releaſe of all actions in the references before in note 4 to page 330.

By ſuch a releaſe alſo from the Lord to the tenant, the ſervices are extinct.

Co. 10. 47. ſuper Lit. 289. But this releaſe will not bar a man of a poſſibility of a right that he hath at the time of the releaſe, or of a right that ſhall deſcend to him afterwards. And therefore if the conuſee of a ſtatute, before execution, releaſe all his right in the land to the terre-tenant; or the heir of the diſſeiſee, in the life-time of his father, do releaſe to the diſſeiſor all his right; theſe releaſes do not bar them. Nor will this releaſe bar a man of an *audita querela*, and ſuch like things. And yet if the tenant in a * real action, after the demandant hath recovered the land, releaſe to him all his right in the land; this doth bar him of a writ of error, for any error in the proceeding in that ſuit.

* P. 340.

Co. ſuper Lit. 150. Dier 157. And if there be Lord and tenant by fealty and rent, and the Lord, by his deed reciting the tenure, doth releaſe all his right in the land, ſaving his ſaid rent; by this releaſe the right of the ſeigniory, ſave only of the ſeigniory of the rent and fealty, is extinct. And if the lord releaſe to his tenant all his right to the land and ſeigniory *ſalvo ſibi dominio ſuo, &c.* hereby the ſervices only, not the tenure is extinct.

Perk. ſect. 644. And if one have a rent-charge out of my land, and make ſuch a releaſe of all his right in the land to me that am the terre-tenant, without exception of the rent; hereby the rent is extinct and gone for ever (1).

Kelw. 484. 6. 7. 8. Co. ſuper Lit. 205. 345. By a releaſe of all a man's title unto lands or tenements, without more words, is releaſed and diſcharged as much as is releaſed by the releaſe of all a man's right, and both theſe releaſes have the like operation: For howſoever title ſtrictly and properly is where a man hath lawful cauſe of entry into lands whereof another is ſeiſed, for which he can have no action, yet it is commonly taken more largely, and doth include a right alſo. And *titulus eſt juſta cauſa poſſidendi quod noſtrum eſt.*

Of all title.

Co. 8. 151. By a releaſe of all entries, or rights of entry, a man hath into lands, without more words, a man is barred of all right or power of entry into thoſe lands upon any right whatſoever. And if a man have no other means to come by the land but by an entry, and he hath releaſed that by theſe words; he is barred for ever. But if one have a double remedy, *viz.* a right of entry, and an action to recover his right by, and then releaſe all entries; by this he is not barred of his action.

Of entry or right of entry.

Lit. ſect. 492. 493. 495. Co. 8. 151. Lit. ſect. 115. 500. Co. ſuper Lit. 288. 289. By a releaſe of all actions real, without more words, are diſcharged all real and mixt actions then depending, and all cauſes of real and mixt actions not depending. And therefore all cauſes of ſuing of aſſiſes, writs of entry, *Quare impedit*, actions of waſte, and the like, which the party hath at the time of the releaſe made, are hereby diſcharged. But this releaſe will not bar him that doth make it of any cauſes of action that ſhall ariſe and accrue afterwards. Neither will it bar him of an appeal of death or robbery, writ of error, or any ſuch like thing: nor of any thing which a releaſe of all actions will not bar. And yet when land is to be reſtored or recovered by judgement in a writ of error; this releaſe is a bar to the writ of error. So if a judgement be given upon a falſe verdict in

Of actions real.

(1) See more amply as to the operation of a releaſe of all right, in *Com. Dig.* Releaſe (E. 2.)—*Vin. Abr.* Releaſe (T).

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a real action, a releaſe of all actions real is a bar in an attaint.

Of actions perſonal. * P. 341.

* By a releaſe of all actions perſonal, without more words, are diſcharged all perſonal actions then depending, and all cauſes of perſonal actions wherein a perſonal thing only is to be recovered, and therefore hereby are diſcharged all cauſes of ſuing out of actions of debt, treſpaſs, detinue, or the like. Alſo all mixt actions, as actions of waſte, *Quare impedit*, an aſſiſe of novel diſſeiſin, writ of annuity, appeal of maihem, and the like. Bro. Releaſe 47. Co. ſuper Lit. 285. 9 H. 6. 57. Lit. ſect. 502.

And if debt, *&c.* or damages be recovered in a perſonal action by falſe verdict, and the defendant bringeth a writ of attaint; or if a writ of *Audita querela* be brought by the defendant in the former action to diſcharge him of execution; by this releaſe, the defendant in both caſes is barred of his ſuit. Co. ſuper Lit. 209.

Alſo when by a writ of error the plaintiff ſhall recover or be reſtored to any perſonal thing only, as debt, damage, or the like; as if the plaintiff in a perſonal action recover any debt, *&c.* or damages, and be outlawed after judgement; in this caſe, in a writ of error brought by the defendant upon the principal judgement, this releaſe will bar him. But where by a writ of error the plaintiff ſhall not be reſtored to any perſonal or real thing, this releaſe is no bar: as if a man be outlawed in an action perſonal by proceſs upon the original, and bring a writ of error, and then releaſe; this is no bar to him. Co. ſuper Lit. 288. Lit. ſect. 503.

If a man by wrong take or find my goods, or they be delivered to him, and I releaſe to him all actions perſonal, notwithſtanding this releaſe, I may in this caſe take my goods again, albeit I be barred of my action by this releaſe (1). Neither is this releaſe a bar in an appeal of robbery or death. Neither will it bar in any caſe where a releaſe of all actions will not bar. Neither is it any bar to an action of debt brought for an annuity granted for a term of years for any arrearages that ſhall grow due after the releaſe. Nor for any rent, or ſum of *nomine penæ*, when the releaſe is before the day of payment, or *nomine penæ* happen. Neither is it a bar in real actions wherein damages are recoverable only by the ſtatute, and not by the common law, as in a writ of dower, entry, *ſur diſſeiſin in le per, Mordanceſter, Aile, &c.* (2). Lit. ſect. 497. 498. 500. Co. ſuper Lit. 292. 285.

Of debts.

By a releaſe of all debts without more words, are diſcharged and releaſed all debts then owing from the releaſee to the releaſor upon eſpecialties, or otherwiſe, all debts due alſo upon ſtatutes. And therefore if the conuſor himſelf, or his land, be in execution for the debt, and he hath ſuch a releaſe, he muſt be diſcharged: and ſo he cannot be upon a releaſe of all actions. Co. ſuper Lit. 76. 291. Fitz. Audita Querela. 3.

Of duties.

By a releaſe of all duties, without more words, is a releaſor barred and the releaſee diſcharged of all actions, judgements, * and executions, alſo of all obligations. And if the body of a man be in execution, and the plaintiff make him ſuch a releaſe; hereby he ſhall be diſcharged of execution, becauſe the duty itſelf is diſcharged. And if there be rent or ſervices behind to the Lord from his tenant, and the Lord make ſuch Co. 8. 153. ſuper Lit. 291.

* P. 342.

(1) See accordingly, *Skin.* 57. *Foſt* v. *Raſtall.*

(2) See further what things ſhall be releaſed by a releaſe of actions perſonal, in *Vin. Abr.* Releaſe (R).

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a releaſe to his tenant; by this it ſeems the arrearages are releaſed.

Co. 8. 154. 157. 5. 70. ſuper Lit. 291.

This word is of a ſomewhat more large extent than actions; for by a releaſe of all ſuits, without more words, is releaſed and diſcharged as much as by a releaſe of all actions. And hereby alſo are diſcharged all executions in the caſe of a ſubject. But in the caſe of the King it doth not releaſe executions. And this doth not releaſe a covenant before it be broken (1).

Of ſuits.

Prerogative.

Co. ſuper Lit. 292. 8. 157. 5. 70.

By a releaſe of all quarrels, without more words, all actions real and perſonal, and all cauſes of ſuch actions, are releaſed and diſcharged. So likewiſe by the releaſe of all controverſies, or by the releaſe of all debates. But this will not bar the releaſor of any cauſes of ſuit that ſhall ariſe after, and were not at the time of the releaſe: as the breach of a covenant which ſhall be after, albeit the covenant be before, is not diſcharged hereby.

Of debates, quarrels, controverſies.

Co. 1. 112. 10. 51. ſuper Lit. 292.

By a releaſe of all covenants, without more words, all covenants then broken, and all that ſhall be after broken, but were then made and in being, are diſcharged. *Qui deſtruit medium deſtruit finem.*

Of covenants.

Adjudged Hil. 4 Jac. B. R. Hancock's caſe.

And therefore if a leſſee do covenant to leave a houſe, leaſed to him, at the end of the term, as it was at the beginning of the term, and the leſſor before the end of the term releaſe to the leſſee all covenants; this doth diſcharge the covenant. But this releaſe doth diſcharge nothing elſe but covenants (2).

Co. 10. 47.

By a releaſe of all ſtatutes from the conuſee to the terre-tenant, without more words, the ſtatute is diſcharged. And yet if he releaſe all his right in the land of the conuſor; this will not diſcharge the land of execution.

Of ſtatutes.

Co. 2. 16. Lit. ſect. 503.

By releaſe of all errors and writs of error, all errors and writs of error, and that before they be brought, are extinct and diſcharged. And if a man be outlawed in a perſonal action by proceſs upon original, and make ſuch a releaſe; this will bar him.

Of errors.

Lit. ſect. 148.

By a releaſe of all warranties or covenants real, all warranties then made and in being, are for ever diſcharged.

Of warranties.

Co. 10. 51. Dier 56. Co. ſuper Lit. 76.

By a releaſe of all legacies without more words, a man doth bar himſelf of all the legacies given him *in preſenti* or *futuro*; ſo that if he be to have a legacy at twenty-four years old, and at twenty-one years of age he releaſe to the executor all legacies or this legacy in particular; this is a bar to him of this legacy for ever. * And yet a releaſe of all demands in this caſe is no diſcharge of his legacy.

Of legacies.

* P. 343.

Co. ſuper Lit. 292.

By a releaſe of rent, the rent is extinct and diſcharged, whether the day of payment be come or not. But a releaſe of all actions will not diſcharge a rent before the day of payment come.

Of rent.

Adjudged Hil. 16 Jac. B. R. Briſcoe v. Heires. Co. 10. 51.

By a releaſe of all promiſes or *aſſumpſits*, without more words, a man may bar himſelf of a contingent or future thing, that by other words could not be releaſed: as if a man promiſe to me, that if *I. S.* do not pay me one hundred pounds the tenth of *March* next, that he will pay it me the twentieth of that month, and before the time I releaſe him to all actions and de-

Of promiſes.

(1) By a releaſe of all ſuits a man is barred of a writ of error.—*Cole's* Caſe, *Latch* 110.

(2) A releaſe of *all covenants* until ſuch a day, is no diſcharge of *covenants which were broken before*; for being broken before, there was no covenant as to them; per *Hobart J. Hutt.* 17. *Smith* v. *Stafford.*—See more amply what ſhall be deemed a releaſe of covenants in *Vin. Abr.* Releaſe (U. 5.)—*Com. Dig.* Releaſe (E. 4).

mands, this will not discharge the promise. But if I release to him all promises, this will bar me. *Et sic de similibus* (1).

Of judgments. Of executions.

By a release of all judgments, without more words, is he that maketh it barred of the effect of any judgment he hath against the releasee; for if execution be not taken out, he is now barred of it. And if the releasee, or his land, *&c.* be in execution, he and it shall be discharged thereof by *Audita querela.* And by a release of all executions, without more words, a man is barred of taking or having out of any execution upon any judgment either before *scire facias* or after. But if after execution be made by *Capias ad Sat. Elegit*, or *fieri facias*, the plaintiff release to the defendant all executions, he cannot plead such a release, but he must have an *Audita querela*; and that he may have to discharge him of execution (2).

Lit. sect. 507. Co 8. 151. su er Lit. 290.

Audita querela.

Of appeals.

By a release of all appeals, are discharged all appeals of felony, of death, of robbery, of rape, of burning, of larceny depending, and all causes not yet moved also.

Co. super Lit. 287. 288.

Of advantages.

By a release of all advantages, it seems actions of debt upon account are discharged.

Co. 8. 150.

Of conspiracies.

By a release of all conspiracies, all conspiracies past are discharged, and such also as are only begun and shall be prosecuted and perfected after the release, are likewise hereby discharged.

Kelw. 113.

Of forgeries.

By a release of all forgeries before publication, the forgery is discharged but not the publication, and therefore the releasor may take his remedy for that notwithstanding.

Co. 10. 48.

Of demands or claims.

A release of all demands is the best release of all, and this word is the most effectual word of all, and doth in deed include and comprehend within it most of all the releases before (3). By a release therefore of all demands, without more words, are released all rights and titles to land, warranties, conditions annexed to estates before they be broken or performed and after they be broken. Also by this release, are released and * discharged all statutes, obligations, contracts, recognisances, covenants, rents, commons, and the like. Also all manner of actions, real and personal, appeals, debts, duties. Also all manner of judgments and executions. Also all annuities, and arrearages of annuities and rents. And therefore if a man have a title of entry by force of a condition, *&c.* or a right of entry into any lands; by such a release, the right and title is gone. And if a man have a rent-service, rent-charge, estovers, or other profit to be taken out of the land; by such a release to the tenant of the land, it is discharged and extinct.

Co. super Lit. 291. Co. 8. 154. Lit. sect. 501. 509. 510.

* P. 344.

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(1) With respect to promises by one person for another, it is enacted by the 4th. *sect.* of the *stat.* 29 *Car.* 2. *c.* 3. That no action shall be brought, whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; unless the agreement upon which such action shall be brought, or some memorandum, or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

(2) See fully by what words executions may be released; and what is released by the words all executions; in *Vin. Abr.* Release (U. 3).

(3) If a common person releases all demands, this extends to inheritances, rents, right of entry, *&c.* for all these are implied in demands; but if the King releases all demands, or pardons them, this shall not extend to any inheritance. *Br. Abr.* Charters de pardon *pl.* 67. Releases *pl.* 44. 90.

Adjudged B. R. Paſc. 17. Jac. 'Wotton's caſe.

And therefore if a termor for years, grant the land by indenture to *A.* rendring rent, and at the end of the firſt year he releaſe to the grantee all demands; the rent is hereby extinct during all the time. And a releaſe of all claims it ſeems is much of the ſame nature.

Co. 5. 70.

But by a releaſe of all demands, or of all claims, is not releaſed any ſuch thing as whereof a releaſe cannot be made, as a meer poſſibility, or the like.

Hil. 4 Jac. B. R. Hancock's caſe adjudged.

Neither will this releaſe diſcharge a covenant or promiſe that is future and contingent before it be in being; nor a covenant before it is broken: and therefore if the leſſee of a houſe covenant to leave it as well in the end of his term, as it was in the beginning of his term, and before the end of the term the leſſor releaſe to the leſſee all demands: this is no bar to an action brought for a breach of the covenant afterwards.

Hil. 6 Jac. B.R. Belcher & Hudſon's caſe.

And if a man, in conſideration of a ſum of money given to him by a woman ſole, aſſume to her that if ſhe marry one *M.* that he will pay to her after the death of *M.* one hundred pounds by the year if ſhe ſurvive him, and ſhe marry him, and the huſband releaſe all demands and then die; this is no bar to the duty. So if one promiſe a woman that if ſhe will marry him, that he will leave her worth one hundred pounds if ſhe do ſurvive him, and before the marriage ſhe releaſe to him all actions and demands; this doth not diſcharge the promiſe (1).

And note that all theſe words are of the ſame force, when they are joyned with other words, as when they are alone. Note.

Co. ſuper Lit. 267.

If two tenants in common of land, grant a rent-charge of forty ſhillings out of it to one in fee, and the grantee releaſe to one of them; this ſhall extinguiſh but twenty ſhillings; for that the grant in judgment of Law is ſeveral.

19 H. 6. 4.

If one have ſeveral cauſes of action againſt two, and make a joint releaſe to them: this ſhall be taken to be a releaſe of all joint and ſeveral cauſes of action.

Bro. Releaſe 31. 29.

* So if an executor have ſome cauſe of action for himſelf, and ſome for his teſtator, and he releaſe all actions, indefinitely; this releaſe doth diſcharge both ſorts of actions (2). * P. 345.

Co. ſuper Lit. 280.

If the tenancy be given to the Lord and a ſtranger, and to the heirs of the ſtranger, and the Lord releaſe to his companion all his right in the land; this ſhall enure not only to paſs his eſtate in the tenancy, but alſo to extinguiſh his right in the Seigniory.

Perk. ſect. 71. Bro. Releaſe 85. 9 E. 3.

If there be Lord and tenant of two acres, and the Lord releaſe all his right in one of them to the tenant; hereby the ſervices are extinct for both. So if one have a rent-charge out of twenty-acres, and releaſe all his right in one acre; hereby all the rent is extinct. And yet if *A.* leaſe white-acre to *B.* for life, rendering rent, and afterwards doth releaſe part of the rent; this is good only for ſuch part.

Bro. Releaſe 65.

If I be ſeiſed of land in fee, and I make a leaſe of it to one for life, and after I releaſe all my right in the land for the life

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(1) See accordingly 1 *Wood* 712.---and more amply as to the operation of a releaſe of all demands, in *Bac. Abr.* Releaſe (I.)---*Vin. Abr.* Releaſe (U).

(2) In *Bac. Abr.* Releaſe (E.) it is ſaid, but yet in ſome caſes ſuch general words may according to the intention of the parties be reſtrained.---ſee the caſe of *Hutchinſon* v. *Savage*, as to this point, in 2 Ld. *Raym.* 1306.

of

of the tenant for life, ſo as neither I nor my heirs ſhall have, claim, or challenge, any thing or right in that land for the life of the tenant for life; by this releaſe, nothing is extinct or diſcharged, but the cauſes of action of waſte that were then, and not any cauſe that ſhall happen afterwards. Dier 307.

If a ſtatute be entered into the twentieth of *April*, and the conuſee by a releaſe dated the nineteenth of *April* (meaning to except this ſtatute) doth releaſe all debts and demands till the making of the releaſe; by this releaſe the ſtatute is diſcharged: But if the words had been to the day of the date of the releaſe, *contra*. Per Juſtice Dodridge Trin. 14. Jac. Co. 9. 53.

If a promiſe be of two parts, and he to whom it is made doth releaſe one part, it ſeems this is a releaſe of both.

If *A.* 1ſt. *Jan.* enter into an obligation of forty pounds to *B.* and *B.* 13th. *July* make a deed thus, it is agreed between *B.* on the one part, and *A.* on the other part, that upon good conſiderations *B.* doth acknowledge himſelf fully ſatisfied and diſcharged of all bonds, debts, or demands whatſoever, from the beginning of the world to this day by the ſaid *A.* and that he the ſaid *B.* is to deliver all ſuch bonds as he hath yet undelivered to *A.* except one bond of forty pounds yet unforfeit, which is for the payment of, *&c.* which was the obligation before: in this caſe it was adjudged a good releaſe and diſcharge of all the bonds excepting that one, and that this exception ſhall go to all the premiſſes.

3. In reſpect of the time or eſtate.

* P. 346.

A releaſe of a right, or of an action, cannot be for a time, but it will be for ever. And therefore if a releaſe be made to any * one that hath a fee-ſimple by wrong, by him that hath the right, for one hour, one year, for life or years; this is a good releaſe for ever. Lit. ſect. 467. 470. Co. ſuper Lit. 273. 264. 280. Kelw. 88. Co. ſuper Lit. 9.

And if the diſſeiſee releaſe all his right in the land to the diſſeiſor without naming his heirs, or ſetting down any time how long the releaſee ſhall have the land or the right of the diſſeiſee therein; this is a good releaſe for ever, and doth make the eſtate of the diſſeiſor good for ever, and ſo doth make a good eſtate in fee-ſimple without theſe words [his heirs, *&c.*] And if the diſſeiſor or his heir make a gift in tail, or a leaſe for life, and the diſſeiſee releaſe all his right to the donee or leſſee for life, to have and to hold for life only; this is a good releaſe of his right for ever.

But if the diſſeiſee do diſſeiſe the heir of the diſſeiſor, and make a leaſe to him for life (which is a releaſe in law); by this the right is releaſed during that time only. So if one joint-tenant or parcener releaſe to the other, all his right in the land, without the words [heirs] or any more words: this releaſe doth give to his companion his whole intereſt for ever. And when the Lord, or grantee of a rent, releaſe to the tenant, or terre-tenant generally; by theſe releaſes, a fee-ſimple is transferred without any words of his heirs, *&c.* And yet the Lord may releaſe his ſeigniory to his tenant, to hold to him in tail or for life, and this ſhall be taken and enjoyed accordingly. But if the Lord doth releaſe the ſeigniory to his tenant without any words of heirs put in the deed, the ſame is extinct.

And if I let land to a man for term of years, and after I releaſe to him all my right which I have in the land, without uſing any other words in the deed; or releaſe to him, to have Lit. ſect. 445. 446. 465. Plow. 556. Dier 263.

and to hold for his life; in both theſe caſes, he hath an eſtate for his life only.

And if I leaſe land to a man for his own life, and after releaſe to him, to have and to hold for his own life; hereby he hath but an eſtate for his own life.

But if I make a leaſe to him for another's life, and after releaſe to him, *Habendum* for his own life; by this he hath an eſtate for his own life.

But if I be ſeiſed of land in fee-ſimple, and let it to another for life or years, and then releaſe all my right to him, to have and to hold to him and his heirs, hereby he hath the fee-ſimple. And if I releaſe all my right to him, to have and to hold, to him and the heirs of his body, hereby he hath an eſtate tail.

Lit. ſect. 549. And if one be ſeiſed in fee of a rent ſervice or rent-charge, and grant it firſt for life, and then releaſe it to the grantee, to * hold to him and his heirs, or to him and the heirs of his body; this ſhall enure as an enlargement according to the agreement. * P. 347.

But if one grant a rent-charge for life out of his land *de novo*, and after releaſe to the grantee all his right in the rent, to have and to hold to him in fee-ſimple, or fee-tail; this doth not enlarge the eſtate.

Lit. ſect. 606. 610. 24 E. 3. 28. And if tenant in tail, or for life, make a leaſe for years; and after by deed doth releaſe all his right to the leſſee for years in poſſeſſion, to hold to him and his heirs for ever; this will not make the eſtate of the leſſee good for longer time than the life of the releaſor.

Co. ſuper Lit. 273. If one make a leaſe for ten years, the remainder for twenty years to another, and he in remainder releaſe all his right to the leſſee for ten years; in this caſe, the releaſee hath an eſtate for thirty years and no leſs, for one leaſe for years cannot drown in another (1).

Lit. ſect. 526. Co. ſuper Lit. 299. 300. If I let land to a woman ſole for her life, or for years, and ſhe take a huſband, and after I releaſe to them two to hold for their lives; this ſhall enure no further than the intent, and in the firſt caſe he ſhall hold jointly with his wife, but in her right, whilſt ſhe doth live, and after for his own life if he ſurvive; and in the laſt caſe, they ſhall have the freehold jointly.

Co. ſuper Lit. 280. If there be Lord and tenant by fealty and rent, and the Lord granteth the ſeigniory for years, and the tenant attorneth, and the Lord releaſeth his ſeigniory to the tenant for years and to the tenant of the land generally; by this, the ſeignory is extinct for ever, and the eſtate of the leſſee alſo. But if the releaſe be to them and their heirs; then the leſſee ſhall have the inheritance of the one moiety, and the other is extinct.

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(1) But he that has an eſtate for ten years may ſurrender to him that has an eſtate for twelve years; and the eſtate is drowned and the other ſhall come into poſſeſſion; and a ſurrender to him that has a greater eſtate for years is good as to him that has an eſtate for life, and where the ſurrender is to a *termor in reverſion*, it is all one if the reverſioner had a greater eſtate for years or not, *Cro. Eliz.* 302.—*Vin. Abr.* Merger (G.)—*Merger* is deſcribed to be whenever a greater eſtate and a leſs coincide and meet in one and the ſame perſon without any intermediate eſtate; whereby the leſs is immediately annihilated, or is ſaid to be *merged*, that is ſunk or drowned, in the greater.—Thus, if there be tenant for years, and the reverſion in fee-ſimple deſcends to or is purchaſed by him, the term of years is merged in the inheritance, and ſhall never exiſt any more. But they muſt come to one and the ſame perſon in one and the ſame right; elſe, if the freehold be in his own right, and he has a term in right of another (*en auter droit*) there is no merger, 2 *Bl. Com.* 177.—and ſee fully as to the doctrine of merger in the ſeveral abridgments, &c. under titles *Merger*, and *Extinguiſhment*.

10. Acquittance, *Quid.*

Terms of the law.

An acquittance is a diſcharge in writing of a ſum of money, or other duty, which ought to be paid or done; as, if one be bound to pay money on an obligation, or rent reſerved upon a leaſe, or the like; and the party to whom the money or duty ſhould be paid or done, upon the receipt thereof, or upon ſome other agreement between them, maketh a writing under his hand, witneſſing that he is paid or otherwiſe contented, and therefore doth acquit and diſcharge him of the ſame; the which is ſuch a diſcharge and bar in the law, that he cannot demand and recover the ſame again contrary thereunto, if the acquittance be ſhewed.

11. Where a man is not bound to pay money without he hath an acquittance. * P. 348. †

22 E. 4. 6. 41 E. 3. 25. 1 H. 7. 15. 22 E. 4. 6. Bro. Debt 43. Oblig. 10.

* The obligor is not bound to pay money upon a ſingle bond unleſs the obligee will make to him an acquittance or releaſe. Nor is he bound to pay it before he hath the acquittance. And in this caſe the obligor may compel the obligee to make him an acquittance. And ſo it is in caſe of a ſtatute merchant; one is not bound to pay the money thereupon, before he hath the acquittance or releaſe of the plaintiff. But otherwiſe it is in caſe of an obligation with a condition, for there a man may aver payment (1).

And becauſe ſtatutes, recognizances, and obligations, are often uſed and tend to the ſtrengthening of the common aſſurances of the kingdom, we may not in any wiſe paſs them over, but muſt take ſome ſurvey of them. And firſt of a ſtatute.

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(1) See fully in what caſes payment may be refuſed without an acquittance given, *Vin. Abr.* Acquittance (A.)

† In the former edition of the *Touchſtone* there is a miſtake in numbering the pages; the numbers between *p.* 348. and *p.* 353 being omitted.

CHAP. XX.

CHAP. XX.

Of a Statute.

Terms of the law, ſtat. de mercatoribus Acton Burnel. 11 Ed. 1.

A Statute is a bond or obligation of record: but this word is ſometimes uſed in another ſenſe, *viz.* for a decree made in parliament, called an Act of Parliament. * P. 353. 1. Statute. *Quid.*

And of theſe obligations there are three kinds: 1. A ſtatute merchant: 2. A ſtatute ſtaple: 3. A recognizance. The ſtatute merchant, is a bond acknowledged before one of the clerks of the ſtatute merchant, and the mayor, or chief warden of the city of *London*, or two merchants of the ſaid city for that purpoſe aſſigned, or before the mayor, chief warden, or maſter of other cities, as *York*, *Briſtol*, or the like; or the bailiff of any borough or village, or other ſufficient men for that purpoſe appointed and authorized, ſealed with the ſeal of the debtor or recogniſor, and of the King, which is of two pieces; the greater whereof is kept by the mayor or chief warden, and the leſſer by the ſaid clerk: and the form of it is thus: *Noveritis &c. me* A. B. *teneri* C. D. *in centum libris ſolvend. eidem ad feſtum S. Mich. proxim. Et niſi fecero, concedo quod currat ſuper me & hæredes meos diſtrictio & pœna in ſtatuto domini regis edito apud Weſtm. Dat. &c.* And this, albeit at firſt it was ordained and uſed for merchants only, yet at this day it is and may be uſed and given by any others, and is become one of the common aſſurances of the kingdom (1). 2. *Quotuplex.* Statute merchant. *Quid.*

27 Ed. 3. ſtat. 2. cap. 1, 2, 3, &c. 27 Ed. 3. ſtat. cap. 9. 22 H. 8. c. 6. Co. ſuper Lit. 289. 15 H. 7. 16.

The ſtaple doth ſignify this or that town or city, whither the merchants by common order and commandment do carry their commodities, as wool, and the like, to utter by the great. And the ſtatute ſtaple is either properly or improperly ſo called: that which is properly ſo called, is defined to be a bond of record acknowledged before the mayor of the ſtaple in the preſence of one or two conſtables of the ſame ſtaple, and is ſealed with the ſeal of the ſtaple, and ſometimes alſo with the ſeal of the party, the which it ſeems is not neceſſary. And this is founded upon the ſtatute of 27 *Ed. 3. cap.* 9. and was invented, and is uſed only for merchants and merchandizes of the ſame ſtaple: this is of the ſame nature as the ſtatute merchant is. That which is improperly ſo called, is alſo called a recognizance, which is alſo a bond of record, teſtifying that the recogniſor doth owe to the recogniſee a ſum of money. And of theſe there are divers kinds; for there is one recognizance founded upon the ſtatute of 23 *H.* 8. *cap.* 6. The form whereof is this: *Noveritis &c. me* A. B. *teneri* C. D. *in centum* Statute ſtaple. *Quid.* Recognizance. *Quid.*

(1) *Statute merchant* and *ſtatute ſtaple* are deſcribed by Mr. Juſtice *Blackſtone* (in 2 vol. *Com.* 160.) to be ſecurities for debts, originally permitted only among traders, for the benefit of commerce; whereby the lands of the debtor are conveyed to the creditor, 'till out of the rents and profits of them his debt may be ſatisfied; and during ſuch time as the creditor ſo holdeth the lands, he is tenant by ſtatute merchant, or ſtatute ſtaple.—Statute merchant is purſuant to the ſtat. 13 *Edw.* 1. *de mercatoribus.*—Statute ſtaple is purſuant to the 27 *Edw.* 3. *c.* 9.—Though the ſtatute merchant was firſt introduced and wholly calculated for the benefit of merchants, yet they were not long ingroſſed by them; for other men finding from their own obſervation that they were much of the ſame nature with judgments given in *Weſtminſter Hall*, but obtained with infinite leſs trouble and expence, out of regard to their own intereſt and quiet, eaſily fell into this way of contracting, and by degrees it came to be improved into a common aſſurance—See *Hickford's* caſe, *Winch. Rep.* 83

* P. 354. *libris ſolvend. eidem ad feſtum S. Mich.* * *proxim. Et ſi defecero in ſolutione debi. predict. volo & concedo quod tunc currat ſuper me hæredes & executores meos pœna in ſtatuto ſtapulæ debit. pro marchandiſis in eadem emptis recuperand. ordinat. & proviſ. dat. &c.* And this is always to be acknowledged before the chief juſtice of the King's Bench, or of the Common Pleas in the term time, or in their abſence out of term, before the mayor of the ſtaple at *Weſtminſter*, and the recorder of the city of *London* for the time being (1). And it is to be ſealed with the ſeal of the conuſor, and with the ſeal of the King appointed for that purpoſe, and with the ſeal of the chief juſtice, mayor and recorder before whom it is acknowledged; and they, before whom it is taken, do ſubſcribe their names to it: and this was ordained, and may be and is uſed by merchants, or any other whomſoever, for payment of debts, or aſſurance of other things: and this alſo is of the ſame nature as the ſtatute merchant is: and both this and the two former, are much of the nature of judgements had upon ſuits in the courts of King's Bench and Common Pleas, and therefore they are called pocket judgements.

Pocket judgments.

Co. 8. 153.

There are alſo divers other kinds of recognizances, that are taken by and acknowledged before the Lord Keeper, Maſter of the Wards, Maſter of the Rolls, Maſter of the Chancery, Juſtices of the one bench or of the other (ſome of which are called bails) Barons of the Exchequer, Judges in their circuits, Juſtices of the Peace, Sheriffs, and others; ſome whereof are by the common law, and ſome by certain ſtatutes. And amongſt theſe, ſome are without ſeal, and recorded only, and ſome are ſealed and recorded alſo: and ſome of them are in a ſum certain, as the recognizances taken in the Common Pleas for bail are, and ſome of them are incertain, as thoſe recognizances that are taken for bail in the King's Bench, which are after this manner, *Si judicium redditum &c. tunc volo & concedo*, that the debt recovered againſt the defendant ſhall be levied of my goods and chattels, *&c.* And theſe alſo are much of the nature of the former kind of recognizances. And all obligations made to the King are of the nature, and have the force of a recognizance (2).

Bail.

Prerogative.

See ſtatutes 33 H. 8. c. 22. 39. 3 H. 7. c. 1. 10 H. 6. c. 1. Dier 325. 307. F. N. B. 251. f. 132. c. 133. a. 68. a.

Statutes and recognizances are ſometimes ſingle, without any defeaſance; and ſometimes they are double, *i. e.* with a defeaſance or condition, upon the performance whereof the ſame are to be avoided.

Conuſor. Conuſee.

The debtor, or he that doth enter into the ſtatute or recognizance, is called the recogniſor, or conuſor; and the debtee, or he to whom it is made, is called the recogniſee or conuſee.

* P. 355.

3. What ſhall be ſaid a good ſtatute or recognizance, and what not: firſt, in reſpect of the perſons before whom it is acknowledged.

* To make a good ſtatute or obligation of record, the form preſcribed muſt be purſued. 1. In reſpect of the perſons before whom: and therefore, the ſtatute merchant, or ſtaple, or the recognizance founded upon the ſtatute of 23 *H.* 8. may not

Dier 35. Lit. Bro. ſect. 484. 511. F. N. B. 267. a.

(1) A recognizance is an obligation of record, which a man enters into before ſome court of record or magiſtrate duly authorized, with condition to do ſome particular act; as to appear at the aſſiſes, to keep the peace, to pay a debt, or the like. It is in moſt reſpects like another bond: the difference being chiefly this, that the bond is the creation of a freſh debt or obligation *de novo*, the recognizance is an acknowledgment of a former debt upon record. 2 *Bl. Com.* 341.

(2) See more amply as to the nature and deſcription of ſtatute merchant,—ſtatute ſtaple,—and recognizance, in *Vin. Abr.* Statutes (E. 11.)—*Com. Dig.* Statute-ſtaple (A.)—*Bac. Abr.* Execution (B.)

be acknowledged before any others beſides the perſons appointed by the ſtatutes. Neither may any other recognizance be acknowledged before any, but ſuch as either have power *ex officio*, and by their offices to take them, or have ſpecial commiſſion ſo to do; and therefore a recognizance taken by a conſtable is void. If a recognizance be made to the Lord Keeper and two others, and it be acknowledged before himſelf, this is void as to him. 2. In reſpect of the manner of making and acknowledging of it. And therefore if the ſubſtantial form appointed by the ſtatutes be not obſerved, it will be void. If therefore a ſtatute merchant be not ſealed with the ſeal of the debtor, and there be not a ſeal of two pieces annexed to it, this is no good ſtatute, neither can it take effect as a ſtatute; howbeit in this caſe, if it be delivered by the party, it may take effect as an obligation: but if the variance from the ſtatutes be only in ſome circumſtance, this will not hurt a ſtatute or a recognizance. And therefore it is held, that albeit there be no time ſet for the payment of the money in the ſtatute, yet the ſtatute is good, for then it is due preſently. And albeit the ſtatute be written with another's hand, and not with the hand of the clerk of the ſtatutes or the like, yet is the ſtatute good enough. And if a ſtatute ſtaple be not ſealed with the ſeal of the party that doth acknowledge it; yet it ſeems it is good enough, for the ſtatute doth not require it: but a recognizance within the ſtatute of 23 *H.* 8. cannot be good, except the ſeal of the party be to it, for ſo are the words of the ſtatute (1).

Dier 220.

Secondly, in reſpect of the manner of making it.

Hollingworth verſ. Aſcugh. Paſch. 35 El. C. B. adjudged.

Obligation.

Perk. three Juſtices C. B. Trin. 22 Jac.

Co. 8. 153. If a recognizance or a ſtatute be to pay money at ſeveral days, it is good enough; and if the conuſor fail one day, execution may be ſued of the whole ſtatute (2).

Stat. 27 El. cap. 4. Every ſtatute ſtaple or merchant, not brought to the clerk of the recognizances within four months next after the acknowledging, to enter a true copy thereof, ſhall be void, againſt all perſons, their heirs, ſucceſſors, executors, adminiſtrators and aſſigns, except thoſe only, which for good conſideration ſhall, after the acknowledging of the ſame ſtatute, purchaſe the land or any part liable thereunto, or any rent, leaſe or profit out of it.

Fitz. Accompt. 97. Execution in toto. Bro. Statute in toto. Stat. Acton Burnel de Mercatoribus. 27 E. 3. c. 9. F.N.B. 130. 131. 132. Dier 180. 15 H. 7. 15. Co. 4. 67. 7 H. 7. 12. Plow. 61. 62. 82.

* The proceedings upon a ſtatute or recognizance, to have the fruit and effect thereof, are not like to the proceedings in other caſes of ſuits upon obligations and the like, to reduce them to judgment; but as they are in their own nature much like to the nature of a judgment, ſo is the proceeding and execution thereupon much like to the proceding and execution upon a judgment: and therefore the conuſee may, if he pleaſe, bring an action of debt upon a ſtatute, and wave all other proceeding: or otherwiſe, if he like not this courſe, he [or, if he be dead, his executor or adminiſtrator, and, if his executor be dead, the executor of his executor] may, as ſoon as the ſame is forfeit, have preſent execution of it after this manner: he

* P. 356.

4 All the proceedings upon a ſtatute or recognizance; and the manner and order of execution thereupon.

(1) See the ſtatute 8 *Geo.* 1. *c.* 25. being an act for ſupplying ſome defects in the ſtatute of the twenty-third of king *Henry* the eighth, intitled, an act for obligations to be taken by two chief juſtices, the mayor of the ſtaple and the recorder of *London*, and for ſetting down the time of ſigning judgment in the principality of *Wales*, and counties palatine.

(2) See further what ſhall be deemed a good ſtatute merchant, ſtaple, or recognizance in *Vin. Abr.* Statutes (F.)

must bring his ſtatute to the Mayor and clerk and other officer, before whom it was acknowledged; and there if they find the record of it, and the day to be paſt for the payment of the money, they are to apprehend and impriſon the body of the conuſor, if he be a lay-perſon, and can be found within their juriſdiction; and if he cannot be found there, they are to certify the record into the chancery, which alſo, if they refuſe to do, they may be compelled thereunto by a *certiorari*; and if that certificate be faulty, or execution be not done upon it by reaſon of the death of the conuſee or otherwiſe, the conuſee or his executor, or adminiſtrator, may have another certificate; and thereupon, in caſe of the ſtatute merchant, he ſhall have a writ of *capias* out of the chancery, directed to the ſheriff of the county where the conuſor lives, to apprehend and impriſon him (if he be not a clergyman) and this is to be returned in the Common Pleas or King's Bench. And when the conuſor is taken, he ſhall have time for a quarter of a year to make his agreement with the conuſee, and to ſell his lands or goods to ſatisfy the conuſee: and for that purpoſe he may ſell his lands or goods, albeit he be in priſon, and his ſale is good and lawful: and if in that time he do not ſatisfy the conuſee, or if upon the *capias* the ſheriff return a *non eſt inventus*, then by another writ [or by divers writs, if the lands or goods lie in divers counties] called an *extendi facias*. And in the caſe of a ſtatute ſtaple, preſently after the certificate into the Chancery, the conuſee ſhall have a writ to take his body, and extend his lands and goods returnable in Chancery: and this writ is a commiſſion directed to the ſheriff of the county where the lands and goods lie, for the valuing of the ſame; whereby all the lands, goods and chattels of the conuſor ſhall be appraiſed and valued at a reaſonable rate by a jury of ſworn men, charged by the ſheriff for that purpoſe; which inquiſition ſo taken is to be returned by the ſheriff, and thereupon the lands, goods and chattels are to be taken into the ſheriff's hands, and by him to be delivered to the * conuſee (which the ſheriff may do if he will without any writ) to hold unto the conuſee until he be ſatisfied his debt and damages. And if the ſheriff refuſe ſo to do, the conuſee ſhall have a writ out of the chancery called a *liberate*, to compel him to deliver to the conuſee the lands, goods, and chattels, ſo found by inquiſition, and taken into his hands upon the extent, which the ſheriff need not to return; or the conuſee may enter upon the land himſelf, and take the goods out of the ſheriff's hand: and this act of the ſheriff and jury upon this writ is called an extent: and if the jurors or appraiſors upon the *extendi facias*, overvalue the lands or goods in favor to the debtor, the conuſee hath no remedy but by motion in that court where the writ is returnable at the return day, or at leaſt the ſame term wherein the writ is returnable, to deſire that the appraiſors may take the lands or goods at the rate they have valued them, in the ſame manner as the conuſee is to have them. But if the conuſee accept of the lands and goods from the ſheriff, or ſuffer the term to paſs wherein the writ is returnable, he is too late, and hath no remedy at all. And if the appraiſors do undervalue the lands or goods in favour to the debtee, it ſeems the conuſor hath no remedy at all, for he may at any time pay all or the reſidue of the debt and damages unlevied, and have his land again if he

Certiorari.

Capias.

Extendi facias. Quid.

* P. 357.

Liberate Quid.

Extend. *Quid.*

Co. ſuper Lit. 290. Stat. 23 H. 8. c. 6. 5 H. 4. c. 12. 2 R. 3. 7. 14 Ed. 3. 11. Lit. Bro. Sect. 294. 123. 226. Dier 299. Co. 5. 87. 4. 82. 57. 66. Stat. 11 H. 6. c. 10. Kitch. 116.

Adjudged. Butler v. Wallis, paſ. 38 Eliz. B. R.

pleaſe. And in caſe where the inquiſition or extent taken and made, is inſufficient, as if part of the land only be extended in the name of all the lands, or it is found the conuſor died ſeiſed of land, and it is not ſaid of what eſtate, or the like, the conuſee ſhall have a new extent, and this is called a re-extent; and this he may have, albeit the lands or goods be delivered to the conuſee by a *liberate*, if the conuſee have not entred upon and accepted it, but if he once accept it, he can never after have a re-extent: and when the conuſee is in poſſeſſion of lands by ſuch an extent as before, then is he tenant by ſtatute; and after the conuſee is once ſettled in peace in the lands extended, he ſhall hold it until he be ſatisfied his debt, and his reaſonable coſts and damages for travel, ſuit, delay, and expence. But it ſeems the time ſhall not run out nor be ſaid to begin until the entry of the conuſee into the land; for if the land be extended and remain ſeven years without a *liberate* made, yet he may have a *liberate* at the end of the ſeven years; and as ſoon as the conuſee ſhall be ſatisfied his debt and damage by the goods and chattels of the conuſor, and by the ordinary and certain, or extraordinary and caſual profits of the land, the conuſor ſhall have his land again: and for that purpoſe, if the conuſee refuſe to give him an account, and to yield up his land to him the conuſor, howbeit he may not enter, yet he may compel the conuſee thereunto by a writ called a *venire facias ad computandum*, in the nature of a *ſcire facias*; by which the conuſor ſhall call the conuſee, his * executors or adminiſtrators, to account; and if, upon the account, it ſhall appear he is ſatisfied, the conuſor ſhall have his land again; and if it appear he is over-ſatisfied, he ſhall anſwer the overplus to the conuſor. But the conuſor may not enter upon the conuſee until he hath brought this writ, and made it thereupon to appear that the conuſee is ſatisfied (1). And in caſe the conuſee be dead, his executor or adminiſtrator may have execution of the ſtatute without any *Scire facias*, upon the ſhewing of the ſtatute and the teſtament in Chancery. And if the ſheriff return that the conuſor is dead, the execution ſhall be made of his lands only in the hands of his heir or the purchaſor; but if the heir be under age, the execution cannot be done until he be of full age: and if the conuſor die in priſon, the execution ſhall be of his lands, goods, and chattels: and if the gaoler that hath him in priſon ſuffer him to eſcape, he muſt anſwer that debt: and if it fall out that the conuſee, his executor or adminiſtrator, be ouſted, or diſturbed of his execution by the conuſor himſelf, or any other during the time of the extent, he may relieve himſelf againſt the diſturber by aſſiſe, or other action, as another in the like caſe may do: and if he be rightfully ouſted or diſturbed by one that hath better right, as by one that hath a former ſtatute or the like, or by

Re-extent.

Tenant by ſtatute.

Venire facias ad computandum. Quid.

* P. 358.

Executor.

Age.

Eſcape.

(1) And when the conuſor brings a *Scire facias ad computandum*, at common law the conuſee ſhall not account according to the true value, but according to the extended value; and if the conuſee is ſatisfied by the extended value, the conuſor ſhall recover; or if the conuſor will pay down the reſt of the money which is behind with damages, he ſhall alſo recover. But if the conuſor will ſue the conuſee in a court of equity, then he ſhall bring him to account for what he hath received of the profits above the extended value. *Marſh* v. *Lee*, 2 *Vent.* 338.—See further as to the conuſors remedy when the conuſee is ſatisfied, in *Bac. Abr.* Execution (B. 7.)—*Com. Dig.* Statute-ſtaple (G.)—and *Vin. Abr.* Statutes Merchant (P. a.) where in *pl.* 3. it is ſaid—*Scire facias ad computandum* does not lies againſt conuſee upon a ſtatute-merchant or ſtaple; *per Bank* J. *quod nota bene.*—*Br. Abr. Scire facias pl.* 153, cites 22 *Aſſ.* 44.—*Br. Abr.* Statute-Merchant, *pl.* 24. cites, S. C.

the

the act of God, as by fire, water, or the like; in theſe caſes, the conuſee ſhall hold the land over after the time of his extent, until he be ſatisfied. But when it is through his own neglect only that he is unſatisfied, as where the lands are delivered to him by the *liberate*, and he after his entry into them make a conditional ſurrender of them; as if lands of the value of 10*l.* by the year, be delivered to him in execution for 40*l.* and he within four years make a conditional ſurrender of hem to the conuſor, and after he enter for the condition broken; in this caſe he ſhall not hold the land over the four years, for he muſt take the profits upon his extent preſently: the proceeding in execution of the ſtatute ſtaple, and the recognizance founded upon the ſtatute of 23 *H.* 8. is after the ſame manner throughout as the proceeding in execution of the ſtatute merchant is; with theſe differences only; that, upon the execution of the ſtatute merchant, there doth iſſue forth a *capias* againſt the body before, any execution be to be made of the lands, or goods and chattels, and the lands and goods cannot be extended until a quarter of a year be paſt after the body is taken, or the ſheriff have returned a *non eſt inventus*; but upon the execution of the ſtatute ſtaple and the recognizance, the body, goods, and lands may be taken together at the firſt; this therefore is a more ſpeedy remedy than the former. Alſo upon a ſtatute merchant, one may have an action of debt; but otherwiſe upon a ſtatute ſtaple; and the *capias* upon the ſtatute merchant may be returnable in the King's Bench, or Common-Pleas, but * the writ of execution upon the other is to be returned in the Chancery.

1. H. 7. 16. F.N.B. 130. 131.

* P. 359.

The proceeding upon the other ſort of recognizances is after another manner; for upon recognizances at the common law, if the money be not paid at the day, the conuſee, his executor, or adminiſtrator, is to bring a *ſcire facias* againſt the conuſor, or if he be dead againſt his heirs when they be full of age; or if the lands the conuſor had at the time of entring into the recognizance, be ſold, againſt the purchaſers of theſe lands which the conuſor had at any time after the recognizance entred into, to warn them to come into that court whence the *Scire facias* cometh, and to ſhew cauſe why execution ſhould not be done upon the ſaid recognizance; and if the party or parties cannot be found to be warned, or being warned do not appear at the time, or appearing ſhew no cauſe why the debt ſhould not be levyed, then the conuſee ſhall have execution of a moiety of his lands by *elegit*, or, if the conuſor be living, of all his goods by *levari* or *fieri facias* at his election; but he cannot have execution of his body, unleſs he bring an action of debt upon the recognizance, or it be by courſe of the court, as it is in the King's-Bench upon a bail, in which caſe a *capias* doth lie.

Dier 360. 315. Kelw. 100. Weſt. 2. chap. 18. Bro. Execution 129. Co. 3. 11. 15 H. 7. 16. Kitch. 117.

Elegit.

Levari facias.
Fieri facias.

Capias.

Sureties.

The proceeding againſt the ſureties in ſtatutes ſhall be as the proceeding againſt the principal; but in caſe where there are moveables of the principal to ſatisfy the debt, the ſurety (as it ſeems) ſhall not be charged (1).

Stat. de Mercatoribus.

5. What things are ſubject and liable to execution upon a ſtatute or recogni-

When a man doth enter into a ſtatute or recognizance, the land of the conuſor is not the debtor, but the body; and the land is liable only in reſpect that it was in the hands of the

Plow. 72. Co. 10. 50. 51. Bro. 36. Merchant.

(1) See more amply as to the manner of ſuing out execution on ſtatutes and recognizances; and wherein the recognizance differs from the ſtatutes, and they from each other, in *Bac. Abr.* Execution (B. 2.)—*Vin. Abr.* Statutes-merchant (K.)—*Com. Dig.* Statute-ſtaple (D.)

conuſor at the time of acknowledging of the ſtatute, or after; and the land is not charged with the debt, but chargeable only at the election of the conuſee; but the perſon is charged; and the land is chargeable in reſpect of the perſon, and not the perſon in reſpect of the land. And therefore albeit the conuſor alien his land to another, yet he remains debtor ſtill, and his body and his goods ſhall be taken in execution: and yet, when execution is ſued upon the land, the land is charged and become debtor alſo.

zance: and when, and how; and what not.

Stat. de Mercatoribus. Co. 3. 12. Plow. 72. Co. 2. 59. Lit. ſect. 358. Dier 205. Bro. Stat. Merchant 44. Dier 7. Co. ſuper Lit. 374.

The body of the conuſor himſelf, but not the body of his heir, executor, or adminiſtrator, is liable to execution and may be taken, albeit there be lands, goods and chattels to ſatisfy the debt; and all the demeſne and copyhold lands, tenements, and hereditaments, corporeal and incorporeal of the conuſor that are grantable over, as his manors, meſſuages, lands, meadows, paſtures, woods, rents, commons, tythes, advowſons and the like; alſo all his goods and chattels, as leaſes for years, wardſhips, emblements, cattle, houſhold-ſtuff, and the like, are liable to execution upon * a ſtatute. And therefore if a man make a leaſe for life, or years, and after enter into a ſtatute, or recognizance; this reverſion *cum acciderit* ſhall be ſubject to execution, and the conuſor cannot (as it ſeems) by any ſale thereof prevent it. And yet the contrary hath been held for law, *Lit. Bro. Sect.* 227. And if one make a feoffment in fee, or leaſe for life, reſerving a rent, this rent is extendable and the conuſee may diſtrain for it. So if the leſſee for life make a leaſe for years rendring a rent, and then the leſſee for life enter into a ſtatute; this rent is ſubject to execution, and it ſeems the conuſee may bring an action of debt againſt the leſſee for years for it. And albeit the rent become extinct by the purchaſe of the conuſor or otherwiſe, yet as to the conuſee it ſhall be ſaid to be in *eſſe* and ſubject to execution ſtill. And therefore if a rent be granted unto me for my life after the death of my wife, and after I do acknowledge a ſtatute, and then my wife die, and then I releaſe the rent to the terre-tenant; this rent ſhall be liable to execution. But annuities, offices in truſt, ſeigniories in frankalmoign, homage, fealty, rights, things in action, and ſuch like things, are not liable to execution upon ſtatutes or recognizances. Alſo a remainder in tail, or in fee, after an eſtate tail in poſſeſſion, is not liable to execution in theſe caſes, except it happen to come into the poſſeſſion of the conuſor.

First, in reſpect of the nature and quality of the things themſelves.

* P. 360.

Dier 373. Doct. & Stud. 53. Bro. St. Marchs. 44. Dier 205. i Harrington's caſe. Paſch. 9. Jac. B. R. a Co. 7. 38. Dier 7. Co. ſuper Lit. 374. Doct. & Stud. 53. Co. 2. 59. x. 62.

Stat de Mercatoribus. Dier 299. Plow. 82. Co. 7. 39. 3. 12. Bro. Recognizance 7. Co. 1. 62. 13H. 7. 22. Bro. Stat. Merchant.

The lands, tenements and hereditaments that are copyhold, albeit the conuſor have the fee-ſimple of them, yet are ſubject to execution, only for the life of the conuſor; but his demeſne lands wherein he hath an eſtate in fee-ſimple, are liable to execution for ever if need require.

Second, in reſpect of the eſtate, property, and poſſeſſion of the conuſor in the things.

The lands the conuſor hath in joint-tenancy with another, are ſubject to execution during the life of the conuſor and no longer; for after his death the ſurviving joint-tenant ſhall have all; but if the conuſor ſurvive his companion, then all the land ſhall be ſubject to execution: and the lands the conuſor hath as tenant in tail, are liable to execution only during the life of him being the tenant in tail; for afterwards they ſhall go to his iſſue in tail. And yet if the tenant in tail, after he hath entred into a ſtatute, ſuffer a recovery of the land intailed, in this caſe the land ſhall be ſubject to execution as if it were

fee-ſimple land. And the lands the conuſor hath in the right of his wife, ſhall be charged and ſubject to execution only during the lives of the huſband and wife together, and no longer.

If a feoffment be made in condition to make an eſtate to another by a day of the ſame land, and before the day the feoffee enter into a ſtatute or a recognizance; this land ſhall be ſubject unto execution until the feoffor re-enter, for the breach of the condition. Lit. ſect. 358.

* P. 361. * If one be diſſeiſed of land, and then enter into a ſtatute; this land ſhall not be ſubject to execution: and yet if the conuſor do after recover the land by entry or action, it ſhall be liable to execution. Co. 2. 59.

The goods and chattels whereof the conuſor is ſolely poſſeſſed, and poſſeſſed in his own right; and the goods and chattels of which he is jointly poſſeſſed with another; and the goods and chattels he hath in the right of his wife, are liable to execution. But the goods or chattels that he or his wife hath as executor or executrix to another, or as pledged only, it ſeems are not ſubject to execution. And if the conuſor deliver goods to another to deliver over to *I. S.* theſe goods before they be delivered over are liable to execution. And if he have leaſes for years in the right of his wife, and die before execution be done, it ſeems theſe leaſes are liable to execution. *Sed quære.* But if the conuſor have goods in his cuſtody of another man's, or have goods he hath diſtrained in the nature of a diſtreſs, theſe are not liable to execution. Stat. de Mercatoribus. Co. 3. 11. 12. Plow. 524. Co. 8. 171. 5. 90. Dier 67.

3. In reſpect of the time.

All the lands, tenements and hereditaments which the conuſor had at the time of the ſtatute or recognizance entred into, or at any time after, into whoſe hands by what means ſoever the ſame are betide and come at the time of execution, are ſubject and liable to the execution. But the lands the conuſor had and did put away before the time of the ſtatute or recognizance entred into, are not liable to execution. And all the goods and chattels the conuſor hath, and are found in his hands, at the time when the execution is to be made by the *extendi facias*, are liable to the execution. But the goods and chattels he had and did *bona fide* do away before the time of execution done, are not liable to the execution. Co. 3. 12. Stat. de Mercatoribus.

4. In reſpect of the quantity.

And of all theſe things before ſubject to execution, the conuſee may take all or part at his pleaſure. And therefore if the conuſor have ſold his lands to divers perſons; or have ſold ſome of his lands to divers perſons, or to one man, and keep the reſt in his hands, or it deſcend to his heir; the conuſee may ſue execution upon the lands in either of their hands at his election; ſo that if the cogniſee after the ſtatute entred into, and before execution, purchaſe part of the land of the cogniſor, he may notwithſtanding have execution upon the reſidue in the hands of the conuſor, or in the hands of his heir; and yet ſo that in ſome of theſe caſes his execution may be afterwards avoided, and he compelled to ſue execution again. Bro. Stat. 10. 48. 25. Plow. 72. See infra.

The conuſee upon other recognizances ſhall have the ſame things in execution as a man ſhall have after a judgment in a ſuit in the King's-Bench or Common-Pleas by *Fieri facias*, or *Levari facias*, all his goods and chattels, and by *elegit* the moiety * of his lands, and all his chattels, beſides the cattle of his plow and implements of huſbandry. But in theſe caſes he Weſtm. 2. Chap. 18. Plow. 72. Co. 3. 12. Dier 306. Kelw. 100.

* P. 362.

cannot take the body of the conuſor in execution, unleſs it be upon a new ſuit, or in caſe of bail in the King's-Bench.

Stat. 32 H. 8. chap. 5.

6. Where a man ſhall have a re-extent or new execution; and where not.

Howſoever by the common-law after a full and perfect execution had by extent returned and of record, there ſhall never be any re-extent, yet by a ſpecial Act of Parliament it is provided, that if after lands, *&c.* be had in execution upon a juſt or lawful title, wherewith all the ſaid lands, *&c.* were liable, tied, or bound, at ſuch time as they were delivered or taken in execution, they ſhall be taken or recovered away from him before he hath received his full debt and damages; in this caſe, after a *Scire facias* had againſt the conuſor his heirs, executors, adminiſtrators or purchaſors, he (or his executors or adminiſtrators if he be dead) ſhall have a new execution to levy the reſidue of the debt and damages then unſatisfied. Wherein

Co. 4. 66. 82. Flow. 61. 15 H. 7. 15. Co. ſuper Lit. 299. Kitch. 116.

theſe things are to be obſerved; 1. In caſe where the conuſee is unlawfully and wrongfully diſturbed either by the conuſor or by a ſtranger, in the taking of the profits of the land delivered to him in execution; there he may and muſt bring his action and recover damages, and theſe damages ſhall go toward his ſatisfaction; for in this caſe, and for this diſturbance, he ſhall not hold the land a day the longer. And where he is hindred by his own neglect or act in the taking of the profits of the land, as where his debt is 40*l.* and he hath 10*l.* a year delivered to him by which he may ſatisfy himſelf in four years, and within the time he make a conditional ſurrender to the conuſor, and enter for the condition broken; in this caſe, he ſhall not hold the land over, neither ſhall he have any re-extent. And where the let or diſturbance is ſuch as wherein the conuſee hath remedy given him by the common-law to hold the land over after the diſturbance removed; in this caſe, he ſhall have no new execution nor re-extent within this ſtatute; for where the conuſee hath remedy in *preſenti* for part, or in *futuro* for all or part, this ſtatute extendeth not to it: and therefore where the conuſee is hindred in the taking of the profits of land by the act of God, as by fire, overflowing of water, or the like; or the act of the party conuſor, or any by or under him, as when one is bound to *A.* in a ſtatute of 100*l.* and after to *B.* in a ſtatute of 200*l.* and *B.* extendeth the land firſt, and then *A.* extendeth the land and taketh it away from *B.* or when the guardian in chivalry doth put out the conuſee by reaſon of the wardſhip of the heir of the conuſor, or the wife of the conuſor doth claim her dower and put out the conuſee, or one diſſeiſe his leſſee for life, or ouſt his leſſee for years, and then acknowledge a ſtatute, and after execution is ſued againſt him, and then the land is delivered to the conuſee, and * after the leſſee for life or years doth enter; in all theſe caſes, becauſe by the common law the conuſee may hold over the land after the time given him by the extent, and after the impediments removed, until he be ſatisfied his debt and damages, therefore, he ſhall have no aid of this ſtatute by re-extent; for he is then only to be relieved by this ſtatute when he is evicted and diſturbed, and is wholly and clearly without any remedy at the common-law. 2. Where the ſtatute ſaith [until he *&c.* or his aſſigns ſhall fully and wholly have levied the whole debt and damages] if he hath aſſigned ſeveral parcels to ſeveral aſſigns, yet all they ſhall have the land but until the whole debt be paid. 3. Where the words be

* P. 363.

[for

[for the which the ſaid lands, *&c.* were delivered in execution] if *A.* diſſeiſor convey the lands to the King, who granteth the ſame over to *A.* and his heirs, to hold by fealty and 20*l.* rent, and after granteth the ſeigniory to *B.* *B.* acknowledgeth a ſtatute, and execution is ſued of the ſeigniory, *A.* dieth without heir, and the conuſee entreth and is evicted by the diſſeiſee; in this caſe, he ſhall have the aid of this ſtatute; but the perquiſite of a villain being evicted is out of the ſtatute. 4. Where the words be [delivered and taken in execution] yet if after the *liberate* the conuſee enter (as he may) ſo as the land is never delivered, yet it is within the remedy of this ſtatute. 5. Albeit the ſtatute ſpeak only of the Recoverer, Obligee, *&c.* and not of their executors, adminiſtrators or aſſigns, yet the ſtatute ſhall extend to them. 6. Where the ſtatute ſpeaks of a *Scire facias* out of the ſame court, *&c.* if the record be removed into another court and there affirmed, he may have a *Scire facias* out of that court. 7. Where the ſtatute gives a *Scire facias* againſt ſuch perſon or perſons, *&c.* that were parties to the firſt execution, their heirs, executors, or aſſigns, *&c.* this muſt not be taken ſo generally as the letter is; for if the firſt execution were had againſt a purchaſer, *&c.* ſo as nothing in his hands were liable but the land recovered, if this land be evicted from the tenant by execution, no *Scire facias* ſhall go againſt him, his executors *&c.* but if he hath other lands ſubject to execution, then a *Scire facias* lieth againſt him or his aſſigns, but not againſt his executor; neither in that caſe can he have a *Scire facias* upon this ſtatute againſt the firſt debtor or recogniſor, but if there be ſeveral aſſigns of ſeveral parcels of lands ſubject to the execution, one *Scire facias* will lie againſt all the aſſigns (1).

7. Where and by what means a ſtatute or recognizance, and the execution thereof, ſhall be diſcharged, ſuſpended, or avoided in all or in part, and where not.

* P. 364.

A ſtatute or recognizance, and the execution thereupon, may be diſcharged divers ways, as by defeaſance, releaſe, payment of the money, debt, and damages, or the reſidue thereof unlevied, delivery up of the ſtatute, purchaſe of part of the land by the cogniſee, or the like. And therefore if there be a defeaſance to the ſtatute or * recognizance, and it be to pay money at a day, or to perform ſome other thing, and the money be paid, or the thing done accordingly, this is a diſcharge of the ſtatute. And therefore if ſuch a ſtatute or recognizance be afterwards ſued againſt the conuſor, he may be relieved by an *audita querela*. And if *A.* bind himſelf to *B.* by a ſtatute of 20*l.* and *B.* ſue execution, and the lands of *A.* are delivered to him in execution until he levy the money, and after *B.* doth make a defeaſance to *A.* by indenture, that if *A.* pay 10*l.* by a day certain, then the ſtatute or recognizance ſhall be void; if this be done accordingly, the ſtatute and the execution thereupon is defeated and diſcharged. And if the cogniſee before execution, or after, releaſe to the cogniſor the ſtatute or recognizance, or the debt; this is a perpetual diſcharge of the

Dyer 297. 315. Co. 6. 13. 20. Aſſ. pl. 7. See Defeaſance.

By defeaſance.

Co. ſuper Lit. 76. 10. 47. 50. 51. ſuper Lit. 265. Bro. Sr. Merchant 25. See Releaſe.

By releaſe.

(1) As to the operation of the *Stat.* 32 *H.* 8. *c.* 5.—See *Cowley* and *Legat's* caſe in *Godb.* 251. and *Cro. Jac.* 338.—but more fully reported in 2 *Bulſt.* 97.—and further in *Co. Lit.* 289. b.—*Clerk* and *Andrews* caſe in *Cro. Jac.* 693. —*Vin. Abr.* Execution (U. a. 3.) — *Com. Dig.* Statute-Staple (D. 7.) — — See alſo the following ſtatutes, whereby further proviſions are made reſpecting executions, 2 *Jac.* 1. *c.* 13.—3 *Jac.* 1. *c.* 8. —21 *Jac.* *c.* 24 — 16 and 17 *Car.* 2. *c.* 5. (made perpetual by 22 and 23 *Car.* 2. *c.* 5.)—16 and 17 *Car.* 2. *c.* 8.—and 29 *Car.* 2. *c.* 3.—3 *W.* and *M.* *c.* 14. §. 5. 6.—5 and 6 *W.* and *M.* *c.* 20. §. 32.—8 *Ann.* *c.* 14. §. 1. the compaſs of a note not permitting, with propriety, an enumeration of the ſeveral particular purpoſes for which theſe numerous acts were made.

ſtatute and the execution thereupon. But if the conuſee before execution releaſe to the conuſor all his right in or to the land, this will not diſcharge the whole execution; for if he may not ſue execution of the land afterwards, (as it ſeems he may, this notwithſtanding,) yet he may ſue execution of his body and goods. But ſuch a releaſe, after execution made of the land, will no doubt diſcharge the land. And yet if a conuſee releaſe all his right in the land to the feoffee of the cogniſor of a parcel of the land, it ſeems this will diſcharge the land of execution; albeit it be before the execution ſued, that this releaſe is made. And ſo it is ſaid it was reſolved *Mich.* 26. 27. *Eliz.* If the cogniſee aſſign the ſtatute or recognizance to the cogniſor or to the terre-tenant, by way of diſcharge of the debt or land; it ſeems this is a good releaſe and diſcharge of it in law. And if the cogniſee purchaſe any part of the land of the cogniſor after the ſtatute or recognizance entred into; this is no diſcharge of the ſtatute or the recognizance, but the cogniſee may have execution notwithſtanding of the lands that are left in the hands of the cogniſor, or of his body, or goods, or all. But if the cogniſee purchaſe parcel of the lands, and a ſtranger another parcel; in this caſe, the lands that are purchaſed by the ſtranger ſhall be diſcharged of execution. And if the cogniſee, after execution ſued, purchaſe any part of the land, or the fee-ſimple of all or part of it doth deſcend to him; by this the whole execution is diſcharged. And if the cogniſee purchaſe all the lands of the cogniſor; by this, the execution, as to the land, is ſuſpended; but this is no diſcharge as to the body and goods of the conuſor, for they are ſubject to execution ſtill. And if the conuſee re-infeoff the conuſor again, the execution may be revived again againſt the lands of the conuſor; ſo that they will be ſubject to execution again, whether they do continue in his hands or be ſold away to others. So alſo if the * conuſee enfeoff a ſtranger after he doth purchaſe the land, and the ſtranger doth enfeoff the conuſor; in this caſe alſo, the execution is revived, and the lands ſhall now be ſubject thereunto as they were before.

Barrow & Graies caſe 38 Eliz.

Plow. 72 F. N. 104. Lit. Bro. Sect. 293. 11. H. 7. 4. Br. Audita Querela. 49. Stat. Merchant 42. Co. ſuper Lit. 150. 25 Aſſ pl. 7. Bro. Stat. Merchant 25. Lit. Bro. ſect. 441. 5 H. 7. 25.

By purchaſe or ſurrender of the land.

* P. 365.

If a leſſee for life make a leaſe for years rendering a rent, and after enter into a ſtatute to *I. S.* and then enter into another ſtatute to *I. D.* and after he doth grant his eſtate to *I. S.*; by this the execution of the ſtatute made to *I. S.* is ſuſpended; and therefore, during the ſuſpenſion, it ſeems *I. D.* albeit he be after in time, may ſue and have the rent in execution (1).

Harrington's caſe Paſche 19 Jac. B. R.

8. Where the conuſor, or his heir, or an alienee, or purchaſer, ſhall have contribution upon a ſtatute, or recognizance; or not.

If the conuſor, after he hath entred into a ſtatute, or recognizance, doth convey away his lands to divers perſons, and then the conuſee ſue execution of the ſtatute upon the lands of one or ſome of them, and not of all; in this caſe, he or they, whoſe lands are taken in execution, may, by an *Audita querela* or *Scire facias*, have contribution from the reſt; wherein theſe differences muſt be obſerved, that one purchaſer ſhall have contribution from another: and therefore if the conuſor ſell ſome lands to *I. S.* and other lands to *I. D.* and the conuſee ſue execution only of the lands of *I. S*; *I. S.* ſhall have contribution againſt *I. D.* And the feoffee of the purchaſer, the feoffee of the heir of the conuſor, the feoffee of the feoffee, and ano-

Plow. 72. Co. 3. 12. 6. 13.

(1) See more amply as to the ſeveral methods of vacating or diſcharging ſtatutes, either before or after execution, in *Bac. Abr.* Execution (B. 7.) *Vin. Abr.* Statutes (L.)—*Com. Dig.* Statute-Staple (F).

ther feoffee, ſhall have contribution of the heir of the conuſor: but the conuſor himſelf ſhall not have contribution from a purchaſer: and therefore if he ſell part of his lands, and keep part in his hands, and the conuſee ſue execution only of the lands in the hands of the conuſor or his heirs; in this caſe, neither he, nor his heirs, ſhall have any contribution from the purchaſers; and one heir ſhall have contribution from another. And therefore if one be ſeiſed of two acres, the one in burrough Engliſh, the other of other land, and he enter into a ſtatute and dye, and he hath but two daughters, and the execution be ſued upon the land of one of them; ſhe ſhall have contribution from the other. So where ſome land doth deſcend to the heir of the part of the father, and ſome to the heir of the part of the mother.

If one be ſeiſed of lands in fee in the county of *A.* and *B.* and enter into a ſtatute or recognizance, and the conuſor dye, and then the conuſee dye alſo, and his executor doth ſue execution of the lands in *B.* only, and hath execution; and after the heir doth ſell theſe lands; in this caſe, the vendee ſhall have no contribution. So alſo it ſeems the law is, if the heir ſell the land to divers, and one of the purchaſers appear to the *Scire facias*, and the judgment is given againſt him, and he afterwards ſell the land, his vendee ſhall have no contribution. And in all theſe caſes, where it is ſaid the one purchaſer ſhall have contribution, * it is not intended that the reſt ſhall give or allow him any thing by way of contribution; but that the party whoſe lands are extended, may by *Audita querela* or *Scire facias*, as the caſe requireth, defeat the execution, and thereby ſhall be reſtored to all the mean profits, and force the conuſee to ſue his execution upon all the land, that the land of every one of the terre-tenants may be equally extended.

* P. 366.

And ſo we fall from an obligation by matter of record, to an obligation by matter of *fait*, which is no record.

CHAP. XXI.

CHAP. XXI.

Of an Obligation.

Finches ley 49.

* AN obligation is a deed in writing, whereby one man doth bind himself to another to pay a sum of money or do some other thing. And he that makes this deed is called the obligor, and he to whom it is made is called the obligee. * P. 367.

1. Obligation. *Quid.* Obligor, obligee.

Co. super Lit. 172.

And it is sometimes simple, or single; which is, when it is to pay a sum of money, or do some other thing, and when it is without any defeasance on a condition in or annexed to it, which also is sometimes with a penalty called a penal bill, and sometimes without a penalty. And this is that which is most properly called an obligation; and sometimes also it is called a single bill, or single bond. And sometimes it is double or conditional; which is, when it is attended upon and accompanied with a condition. And then it is said to be a bond containing a penalty with condition to pay money, or do or suffer some act or thing, &c. And this condition is sometimes called a defeasance, and then especially when it is (as sometimes it is) in another deed or instrument; for most commonly it is inserted into the same deed wherein the obligation, being the other part of it, is contained. And then also it is either subscribed under the obligation, or included within the body of it, or indorsed upon the back of it. And *quacunque via* if the condition be performed, the penalty is saved; if not, the penalty is forfeit (1).

2. *Quotuplex.*

a Bro. 6. Obligat. 67. 30. b Trin 49. Eliz. B. R.

[a] An obligation may be made upon parchment or paper, and in loose parchment or paper, or in a piece of paper or parchment sowed in a book, and either way it is good. But if it be made on a tally, piece of wood, or any other thing but paper or parchment, albeit it be sealed and delivered, yet it is void. [b]

3. What shall be said a good obligation in its original creation; or not. First, for the manner and form of it; and what words are sufficient to make an obligation.

c Co. super Lit. 229. Fitz Obligation 9.

[c] And it may be made in the first, or in the third person; (notwithstanding the statute of 38 *Ed.* 3. *c.* 4. which doth intend only obligations made beyond the sea.) And therefore an obligation so made, as *Memorandum quod* A. *de* B. *debeat* C. *de* D. 10*l.* *in cujus &c.* is good.

Dier 21. 22. 23. Co. 9. 53. 37 H. 6. 9. 22 Ed. 4. 22. Kelw. 34. 21 Ed. 4. 39 11 H. 7. 6.

Albeit the best manner and form of an obligation, is that which is most usual, as, *Noveritis me* A. *de* B. *teneri & firmiter obligari* C. *de* D. *in* 20*l.* *legalis &c. solvend. eidem* C. *aut suo cert. Attornat. executoribus aut administratoribus suis. Ad quam quidem solutionem bene & fideliter faciendam obligo me hæredes executores & administratores meos firmiter per præsentes, &c.* yet any words in a writing sealed and delivered, whereby a man doth prove and declare himself to have another man's money, or to be indebted to him, will make a good obligation (2); * and therefore if a man by deed say but this, *memorandum* that *I. A.* of *B.* do owe to *C.* of *D.* 20*l.* to be paid at Easter next: or *memorandum*, that *I. A.* of *B.* have had of *C.* of *D.* 20*l.* of which there is 10*l.* behind, [or of which I owe him 10*l.*]: or * P. 368.

(1) See fully as to the nature of the security called an obligation, in *Bac. Abr.* Obligation (A.)—2 *Bl. Com.* 340.—*Com. Dig.* Obligation (A.)—*Wood's* Inst. 288.—*Vin. Abr.* Obligation (L).

(2) For various precedents of obligations, see *Mad. Form. Angl.* p. 355.—1 *Horsman* 174.—2 *Wood* 701.

memorandum

memorandum, that *I. A.* of *B.* have received of *C.* of *D.* 20*l.* to be repaid him again: or *memorandum*, that *I. A.* of *B.* do grant to owe [or to pay] *C.* of *D.* 20*l.* or *memorandum*, that *I. A.* of *B.* do promiſe to pay *C.* of *D.* 20*l.* or *memorandum* that *I. A.* of *B.* will pay to *C.* of *D.* 20*l.* or *memorandum*, that *I. A.* of *B.* have had 20*l.* of the money of *C.* of *D.* or *memorandum*, that *I. A.* of *B.* have borrowed of *C.* of *D.* 20*l.* or *memorandum*, that *I. A.* of *B.* do bind myſelf to *C.* of *D.* that he ſhall receive of me 20*l.* all theſe, and ſuch like, are good obligations. So if one ſay [d] *memorandum*, that *I. A.* of *B.* bind myſelf to *C.* of *D.* that he ſhall receive 20*l.* by the hands of *I. S.* when *K.* doth come to his houſe, and at Michaelmas then next following 5*l.* this is a good obligation, and the words [by the hands of *I. S.*] are void. So if one bind himſelf thus, *Memorandum*, that *I. A.* of *B.* owe to *C.* of *D.* 20*l.* for payment of which I bind myſelf and my goods; this is a good obligation, and will bind the perſon, but not his goods. [f] So if one, by deed, covenant or promiſe to do a thing, and then uſeth theſe words, *Ad quam quidem promiſſionem perimplendam obligo me in* 20*l.* this is a good obligation for 20*l.* [g] So if one bind himſelf thus; [h] *memorandum*, that *I. A.* of *B.* am bound to *C.* of *D.* to deliver him twenty quarters of corn by a day, *Ad quod performandum obligo me*, without more words; this is a good obligation. So if one bind himſelf thus; *memorandum*, that *I. A.* of *B.* bind myſelf to pay *C.* of *D.* 10*l.* at Eaſter, and if I fail to pay it then, I do grant to pay him 20*l.* this is a good obligation for the 20*l.* if he fail to pay the 10*l.* And ſome ſay he may recover both the 20*l.* and the 10*l.* So if one bind himſelf thus; [k] *memorandum*, that in conſideration of a bill of 50*l.* wherein *I. S.* is bound for me to *I. D.* for payment of 20*l.* I do bind myſelf in 20*l.* to the ſaid *I. S.* to ſave him harmleſs from all actions of the ſame; this is a good obligation; and if *I. D.* ſue *I. S.* the bill is forfeit. Or if one bind himſelf thus; be it known, *&c.* that *I. A.* of *B.* do owe unto *C.* of *D.* the ſum of 14*l.* to be paid at the feaſt of *&c.* together with ſix pounds which I owe him upon bills and recogniſances ſubſcribed with my hand; this is a good bill, but it is good for no more but the 14*l.* and not for the 6*l.* for the words do only import the time of payment of the 14*l.*

If one make a writing in the form of a ſtatute, which the party doth ſeal and afterwards legally deliver, but it is not ſealed by the King's and the Mayor's ſeal according to the ſtatute; albeit this be not a good ſtatute, yet it may be a good obligation.

If one bind himſelf to pay money or do any other thing, and afterward doth add this clauſe in the deed, *Et ad majorem* * P. 369. *hujus* * *rei ſecuritatem inveni A. de B. & C. de D. fide juſſores, quorum unuſquiſque obligat ſe in toto & in ſolid.* and theſe two do alſo ſeal and deliver the deed; it ſeems this is a good obligation to bind them, albeit there be no other words in the deed.

If an obligation be made to *I. D.* to the uſe of *I. S.* this is a good obligation for *I. S.* in equity; and ſome have ſaid he may releaſe it; but this is much to be doubted: for it is certain *I. S.* cannot ſue the obligor in his own name; but when he hath cauſe of ſuit, he may compel *I. D.* in chancery to ſue the obligor.

[d] Bro. Obligation 56.
[e] Bro. Obligation 16.
[f] Bro Obligation 52. Dier 6.
[g] Bro. Obligation 40.
[h] Bro. Obligation 79.
[i] Foxall's caſe. 9 Jac. B. R.
[k] Fox v. Wright, Trin. 40. El. B. R.
Adjudged Parret & Woolward's caſe. M. 38. 39. El. in the Exchequer Chamber.
Trin 37 El. B. R Fitz. Accompt 79.
Perk. ſect. 158. Fitz. Ob. 1.
Bro. Obl. 72. Cromp. Iur. 63.

Bro. Obl. 47. 14. H. 8. 39 21 Ed. 3. 46. 4. Ed. 4. 29.

If *A.* of *B.* bind himſelf to *C.* of *D.* to pay 20*l.* and ſay not when; yet the obligation is good, and the money is due preſently. So if the obligation be *Solvendum nunquam*, or *ſolvendum* at doomſday, the obligations are good, and the *ſolvendum* void, and the money is due preſently. So if *A.* of *B.* bind himſelf to *C.* of *D.* in 20*l.* *Solvendum* A. *de* B. [where it ſhould be *ſolvendum* C. *de* D.] the obligation is good, and the *ſolvendum* void.

Dier 13. Bro. Obl. 15. 68.

If the obligation be made thus, [*obligo me, &c.*] leaving out theſe words following [*hæredes executores & adminiſtratores*]; this is a good obligation, and the executors and adminiſtrators, but not the heir, are bound by it. And if it be made thus, [*ſolvendum* to the *obligee & ſucceſſoribus ſuis*] and not [*executoribus &c.*] this is a good obligation; and the executors, and adminiſtrators, and not the ſucceſſors, except it be in caſe of a corporation, ſhall take advantage of it.

Co. 10. 133. Fitz. Obl. 12. 2 H. 4. 14.

An obligation may be good, albeit it contain falſe or incongruous Latin or Engliſh, or Latin be put for Engliſh, or *è contra*, if the intent of the parties may ſufficiently appear (1): and therefore if one be bound by the name of *Johannes* for *Johannem*; or one bind himſelf in *octogenta*, for *octoginta libris*; or in *ſeptungentis* for *ſeptingentis libris*; in *wiginti* for *viginti libris*; in ſewteen for ſeventeen pounds; in *quinquegentis* for *quingentis libris*; [l] in *ſeptuageſſimo* for *ſeptuaginta libris*; [m] *ſexingentis* for *ſexcentis libris*; in *quinquageſſimis*, or *quinque decies*, for *quinquaginta libris*; in *octogenta* for *octoginta libris*; or in *viginti livers*, for *viginti libris*; in *viginti nobilibus* for twenty nobles; [n] or in *octigenta libris*, for *octoginta libris*; or *quinginta libris* for *quinquaginta libris*, or the like; theſe miſpriſions will not hurt the obligations, for they are good not with ſtanding. But if one by the obligation bind himſelf in [o] *quinqueagentis libris*, or in *quinqeagentis libris*, or in *quinagentis libris*, or in *ſegintis libris*; theſe obligations are void; for, in theſe caſes, the meaning is ſo uncertain, that it cannotbe diſcerned, and no averment will ſerve to ſupply it in this caſe. [p] So if an obligation be dated 23 *die Aprilie*, in ſtead of *Aprilis*; this is a good obligation; and this miſtake will not hurt.

l Adjudged Vernon's caſe M. 13. Jac. Co. B.
m Graie's caſe 5. Jac. B. R. Mich. 10. Car. B. R. Adjudged.
n Fitz. hugh. treſ. Bridges 3 & 4 Eliz. Co. B.
o Paris caſe M. 4. Jac. B. R.
p Trin. 21. Jac. Nowel's caſe.

Co. 2. 5. See at Fait. Numb. 5.

And if an obligation have no date, or a falſe and impoſſible * date, or have but half the date, as the year of our Lord only; or if it want theſe words *In cujus rei &c.* or the like, if it be ſealed and delivered, it is a good obligation (2). * P. 370.

Co. 10. 110. See Fait or Deed, Num. 51.

A ſingle obligation may be to pay money, or to do any other thing that is lawful and poſſible, and ſuch obligations are good. But if the obligation be to bind a man to do a thing unlawful or impoſſible, it is void: and therefore if one bind himſelf in an obligation to kill a man, burn a houſe, maintain a ſuit, or the like, it is void. So if the obligation be made for maintenance, or to that end, or if it be made purſuant to and in execution of an uſurious contract, or the like, it is void. So if an obligation be made againſt the ſtatute of 23 *H.* 6. it is void. So if one bind himſelf in an obligation, and the matter thereof is altogether uncertain, or inſenſible, it is void; but if there

Secondly, for the matter and ſubſtance of it.

See more infra.

(1) By ſtat. 4 *Geo.* 2. *c.* 26.—Bonds muſt be in the *Engliſh* language only, and not in *Latin* or *French* or any other language whatſoever.

(1) See accordingly *Wood's* Inſt. 290.—1 *Wood* 767.—and more amply by what words an obligation may be made, in *Com. Dig.* Obligation (B.)—*Vin. Abr.* Obligation (D.)—*Bac. Abr.* Obligation (B).

be any reaſonable certainty in it, it is good enough. So if one bind himſelf to go to *Rome* in three days under pain of 20*l.* this is void.

4. What ſhall be ſaid a good condition of an obligation; or not. Firſt, for the manner and frame of it.

The condition of an obligation may be either in the ſame, or in another deed, and it may be indorſed on the back of the obligation, ſubſcribed under it, or contained within it; but the beſt way to make it, is the uſual way, *viz.* The condition of this obligation is ſuch, *&c.* And yet, if it be otherwiſe, it may be good; for if an obligation be made from *A.* to *B.* and on the back of the ſame theſe words are indorſed [that whereas the within bounden *A.* is bound to *B.* in 20*l.* yet *B.* willeth and granteth that if *A.* pay to *B.* 10*l.* at Eaſter, that then the obligation ſhall be void]; it ſeems this is a good condition. So if in the cloſe of an obligation of 20*l.* theſe words be added [that if *A.* (the obligor) pay 10*l.* to *B.* (the obligee) at Eaſter, that the obligation ſhall be void]; this is a good condition. So if an obligation be made from *A.* to *B.* of 20*l.* and theſe words are ſubſcribed [now therefore if the obligor pay 5*l.* quarterly for four years, then it is agreed that the obligation ſhall be void]; this is a good condition. So if a ſingle obligation be made from *A.* to *B.* of 20*l.* and after the obligation is made, *B.* doth by another deed grant, that if *A.* pay him 10*l.* at Eaſter, the obligation ſhall be void; this is a good condition or defeaſance. But if *A.* do bind himſelf in an obligation to *B.* of 20*l.* and after *B.* doth bind himſelf in another obligation to *A.* to perform the covenants of an indenture, and in this ſecond obligation there is a proviſo that *B.* ſhall not ſue upon the firſt obligation till ſuch a time; this is not a good condition.

Plow. 141. 21 H. 6. 51. Fitz. Barre 157.

Bro. Obli. 89. Fitz. Barre 265.

Paſche 8. Jac. B. Simpſon's caſe 21 H. 6. 51. 26 H. 8, 9.

If *A.* be bound to *B.* in 20*l.* with condition that if *B.* do not bring *A.* a horſe before Eaſter, that the obligation ſhall be void; this is a good condition; and if the obligee will have advantage of it, he muſt perform the thing; *Et ſic de ſimilibus.* So if *A.* be bound in an obligation to *B.* in 20*l.* with condition that if *B.* ſhall bring twenty load * of wood to the houſe of *A.* that *A.* ſhall pay him the 20*l.* or that *A.* ſhall pay him 20*l.* when *B.* ſhall bring him twenty load of wood to his houſe; theſe are good conditions; and the thing muſt be done before the money is to be paid.

26 H. 8. 8.

* P. 371.

Bro. Count. 69.

If the condition of an obligation be, that if *A.* (the obligor) do not pay to *B.* (the obligee) 10*l.* that the obligation ſhall be void; this is a good condition; but it ſhall be taken according to the words, and therefore the obligor is not to pay it; and if he be ſued, he may plead performance of the condition in the not paying of it.

Bro. Oblig. 42.

If theſe words be omitted in the cloſe of the condition [that then the obligation to be void,] the condition is void; but it doth not hurt the obligation, for that remains ſingle: but if the next words, *viz.* [Or elſe ſhall ſtand in force] be omitted, the condition is never the worſe: for as the addition of them doth nothing add to, ſo the omiſſion of them doth nothing detract from, the ſtrength of the obligation.

Curia B. R. Paſche 90. Ja. Trueman & Parram's caſe.

Secondly for matter and ſubſtance of it.

The condition of an obligation may be to do any lawful or poſſible thing, as to pay money, deliver goods, or cattle, acknowledge a ſtatute, enter into an obligation, make a releaſe, make an eſtate, ſurrender an eſtate, make reparations, for quiet enjoying, to ſave harmleſs, to defend a title, to perform covenants,

See in Weſt. Symb.

nants, to abide an award, to perform a will, to give ſo much land or money in legacy, to purchaſe lands, to appear in a court, to marry another, not to ſue, not to meddle with an executorſhip, not to revoke a letter of attorney, not to be ſurety, not to play at cards or dice, or any ſuch like thing; and ſuch conditions are good. So alſo it ſeems a condition, that a man ſhall not ſell his goods, is good: but when the matter or thing to be done by the condition is unlawful or impoſſible, or the condition itſelf is repugnant, inſenſible, or incertain, the condition is void, and in ſome caſes the obligation alſo. And herein theſe differences are to be obſerved.

Paſche 8. Ja. Co. B.

Co. 10. 101. 11. 53. ſuper Lit. 206. Dier 304. Plow. 64. Fitz. Obligation, 13. See before in condition and in covenant.

Againſt law.

1. When the thing enjoyned, or reſtrained, to be or not to be done by the condition, is ſuch a thing in its own nature, as that the commiſſion or omiſſion thereof, is *malum in ſe*, there not only the condition, but the whole obligation alſo, is void *ab initio*: and therefore if one be bound in an obligation with condition, that he ſhall kill a man, burn a houſe, do any other felony, commit any treſpaſs, maintain any ſuit unlawfully; or (being an officer) that he ſhall take fees by extortion, or that he (being a Sheriff, *&c.*) ſhall let a priſoner eſcape, or that he ſhall ſave the obligee harmleſs againſt an unlawful deed, or that he ſhall not ſave his land, or that he (being a tradeſman) ſhall not uſe his trade, (and yet it ſeems, a condition, that a man ſhall not uſe his trade in one place, or at one time, or if he do that he ſhall pay ſo much by the year unto another, is not * a condition againſt law,) or that a man (being an officer and an officer *pro bono publico*) ſhall not exerciſe his office, or the like; this condition is void, and makes the obligation and ſo the whole deed void. But when the thing, to be or not to be done by the condition, is ſuch a thing as the omiſſion or commiſſion thereof in its nature is not *malum in ſe*, but only againſt ſome maxim of law; as that a man ſhall make a feoffment to his own wife; or is but *malum prohibitum* only; as that a man ſhall erect a cottage contrary to the ſtatute of 31 *Eliz.*; or is repugnant to the eſtate; as that a feoffee of land ſhall not alien it, or take the profits of it; or that a tenant in tail ſhall not ſuffer a recovery of his land, or the like; in theſe caſes, the conditions only are void, and the obligations remain ſingle and without a condition (1). And yet perhaps, if the obligors be ſued upon theſe obligations, they may have relief in equity (2).

* P. 372.

Equity.

Perk. ſect. 735. Co. ſuper Lit. 207. Fitz. Oblig. 17.27

Impoſſible.

2. When the matter or thing to be done by the condition is ſuch a thing, as in its nature is impoſſible to be done at the time of the making of the obligation, there the obligation is

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(1) In *Mitchell* v. *Reynolds* 1 Pr. Wms. 181. *Parker* Ch. J. in delivering the reſolution of the court ſays,—All the inſtances of conditions againſt law in a proper ſenſe, are reducible under one of theſe three heads:—1ſt. Either to do ſomething that is *malum in ſe*, or *malum prohibitum*. *Co. Lit.* 206.—2dly. To omit the doing of ſomething that is a duty. *Palm.* 172. *Hob.* 12.—3dly. To encourage ſuch crimes and omiſſions. *Fitz.* Obligation 13. *Bro.* Obligation 34. *Dier* 118.——Such conditions as theſe, the law will always, and without any regard to circumſtances, defeat, being concerned to remove all temptations and inducements to thoſe crimes; and therefore, as in *Co. Lit.* 206. a feoffment ſhall be abſolute for an unlawful condition, but a bond void.—— See more amply as to the operation of obligations where the conditions are againſt law, in *Bac. Abr.* Obligation (E. 3.)—*ante* in page 129. and the notes and references thereto.

(2) A Court of Equity will in ſuch caſe decree the bond to be delivered up to be cancelled, according to the caſes of *Tatton* v. *Mollineux*, *Mo.* 109.—and *Jervis* v. *Bruton* in 2 *Vern.* 251.——Equity affords extenſive relief in obligations; as, if they are obtained by fraud;—if the conſideration is not performed; or if it be illegal; or if there was no conſideration at all;—if the condition by accident becomes unreaſonable;—if the obligation was obtained by dureſs, force, or terror; and in various other caſes, explained and well ſupported by authorities, in *Com. Dig.* Chancery (4 D.)—and *Eq. Ca. Abr. Tit.* Bonds and Obligations.

good,

good, and the condition only is void. And therefore if I be bound in an obligation with condition, that I ſhall ſtand to the award of certain perſons, *&c.* provided that the award be made before the tenth day of *May* next, and provided that I have warning fifteen days before the 10th of *May*, and this obligation is made the 9th day of *May*; this is a void condition: and ſo if I be bound in an obligation with condition, that I will go to *Rome* within three days; or that I will make an eſtate of white acre in *Dale* worth 10*l. per annum*, when *re verâ* it is worth but 5*l. per annum*; or that I will be nonſuit in ſuch an action; or aſſure ſuch a piece of ground, when in truth there is no ſuch action, or piece of ground; this condition is void, and the obligation remains ſingle and good. So if the condition be, that whereas *A.* had a judgment againſt *B.* the obligor for 20*l.* and the obligee hath acknowledged ſatisfaction, if therefore the obligor ſhall before ſuch a day get a warrant from *A.* whereby the obligee may be ſaved harmleſs for the ſame acknowledgement, that then, *&c.* this condition is void, and, as it ſeems, the obligation alſo, for that it is not only impoſſible, but againſt law alſo. But when the thing to be done by the condition, is a thing poſſible at the time of the making of the obligation, and after by matter *ex poſt facto*, by the act of God, the act of the law, or the act of the obligee, it is become impoſſible; in this caſe, the obligation, and the condition both, are become void: and therefore if a man be bound with a condition, that he ſhall appear the next term in ſuch a court, and before the day the obligor dieth; hereby the obligation is ſaved. So if *A.* be bound to *B.* that *I. S.* ſhall marry *Jane G.* by ſuch a day, and before the day, *B.* himſelf marry with *Jane G.* hereby the obligation is diſcharged, and *B.* ſhall never take advantage of it (1).

H. 8 29.21. Ed. 4. 54. 42. Ed. 3. 6.

Hill. 17. Jac. B. R.

21 Ed. 4. 53.

* P. 373. Inſenſible Incertain.

* 3. When the condition of an obligation is ſo inſenſible and incertain, that the meaning cannot be known, there the condition only is void, and the obligation good: as if an obligation be made by *A.* to *B.* with condition, that *A.* ſhall keep *B.* without damage againſt *I. S.* for 10*l.* in which the obligee is bound to the obligor; this condition is void, and the obligation ſingle. So if the condition be, that *A.* ſhall pay his part of the ſums of money, that ſhall be levied for the trying of the cuſtoms of *M.* unleſs the word [levied] be uſed for taxed in that country, the condition is inſenſible and void. So if *A.* be bound to *B.* with condition to ſave him harmleſs, and ſay not for what, or againſt whom; this condition is void, and the obligation ſingle: but if any ſenſe or certainty may be made of it, the obligation and condition ſhall be both good (2).

Paſche 9. Jac. B. R.

Repugnant.

4. When the condition of an obligation in the matter of it is repugnant to the obligation itſelf, there the condition is void, and the obligation good: and therefore if the condition of an obligation be, that the obligee ſhall not have benefit by the obligation, or that he ſhall not ſue for the money in the obligation, or the like; this condition is void, and the obligation

7 H. 6. 44. 21. H. 7. 24. 30.

(1) See accordingly *verbatim* in 1 *Wood* 769.—and further as to the doctrine of impoſſible conditions in obligations—*Bac. Abr.* Obligations (E. 1.)—*Vin. Abr.* Condition (C. a.) to (E. a.)

(2) For the doctrine of conditions in obligations where the words are inſenſible, ſee 1 *Vent.* 238.—2 *Mod.* 285.—3 *Lev.* 21.—2 *Salk.* 462.

See Defeasance.

single: and yet this by a defeasance made after the obligation may be done (1).

10 H. 6. 14. 21. Ed. 4. 10.

5. When the thing, to be done by the condition, is to be done beyond the sea, it hath been held that the condition is void, and the obligation single, because the thing was not triable here. But it seems the law is otherwise now, and that the matter is triable here, and the condition good. And in all other cases where a deed in general is void for misnomer, disability, or otherwise, there an obligation is void.

Not triable.

Trin. 7. Ja. B. R.

Fitz. Oblig. 2. 11.

All bonds with conditions, for the enjoying of spiritual livings, contrary to the statute of 13 *Eliz. chap.* 20. are void by the statute of 14 *Eliz. chap.* 11 (2).

If any ladies or gentlewomen be drawn by flattery, or threatening, to enter into any obligation simple or conditional, to pay any money not truly due, they may be relieved by a course in the Chancery, for which see the statute of 31 *H.* 6. *chap.* 39.

Stat. 23. H. 6. chap. 10.

No sheriff or his officers shall take any obligation, by colour of their offices, of any person in their ward, but only to themselves, and in the name of their office, with condition with sureties sufficient, that the prisoner shall appear at the day in the writ. And all others, taken in any other forms, shall be void. And persons that are in his ward, by execution, condemnation, *capias utlagatum*, excommunication, surety of the peace, or some other special case, being sent for by a justice for felony or the like, may not be bailed: and others that are arrested on a *capias* for debt, or an * indictment, or otherwise by writ, bill, or warrant, that are main-pernable, must be bailed. For the better understanding of which statute, these things must be observed; that such obligations as differ and vary from the form of this statute in words and circumstances only, are good notwithstanding this statute. a] And therefore if a prisoner make an obligation with a condition to appear and answer in a plea of debt, and say no more, nor do set down the cause of the debt; this is a good obligation. And if the sheriff take an obligation with one surety only, or with two sureties that are insufficient, or with two sureties of another county; this is a good obligation. So if the debt for which the party is arrested be three hundred pounds, and the sheriff take an obligation of one hundred pounds for his appearance, this is a good obligation; for in these cases it is left to his discretion, and it doth concern him only. So if the condition of the obligation be for appearance *mense Paschæ*, omitting *proximè futuræ*, yet it is a good obligation. So if the party be arrested by an attachment out of the Star-chamber upon a contempt, and the condition of the obligation is, that if the obligee shall appear, and then and there shall answer a contempt

5. When an obligation shall be void, for that it is made to another, and not to the sheriff, or to the sheriff in another manner than is appointed by the stat. of 23 H. 6. ch. 10.

* P. 374.

a] Villar's case M. 9. Jac. B. R.

Co. 10. 101.

Villar's case.

Dier 364.

(1) See accordingly *Mo.* 811. *Trot* v. *Spurling*.—and further as to repugnant conditions in *Vin. Abr.* Conditions (B. a.)—*Bac. Abr.* Obligations (E. 2).

(2) Bonds, entered into for some other particular purposes, are by several subsequent statutes declared to be void.—By stat. 5 & 6 *Ed.* 6. *c.* 16. Bonds which concern the buying and selling of offices which relate to the administration of justice, the King's revenue, &c. are made void, and see the cases of *Lee* v. *Coleshill*, *Cro. Eliz.* 529.—and *Hill and Farmer*, *Style* 29, determined under that statute.——By the stat. 13 *Eliz. c.* 5. Bonds made to avoid the debt or duty of others are void.——Bonds given for money lost by gaming are declared void by statute 16 *Car.* 2. *c.* 7.——9 *Ann. c.* 14.——By statute 7 & 8 *Wm.* 3. *c.* 7. §.—Bonds given to procure any return of any member of Parliament or any thing relating thereunto are declared void.——By stat. 12 *Ann. sess.* 2. *c.* 16. Bonds upon usurious contracts are made void.

by him committed againſt the King and his council, this is a good obligation. And if the party that doth make the obligation be not in the ſheriff's cuſtody, albeit the obligation be made in any other manner eſſentially differing from the form preſcribed in the ſtatute, if it be not againſt the common law, it is a good obligation. And therefore if when a *capias utlagatum* be delivered to the Sheriff againſt a man, the ſheriff take bond of him for his fees, and his travel; this bond if it be not within this ſtatute, yet it is againſt the common law, and therefore void, becauſe it is by colour of the ſtatute an extortion. But where the obligation, whether it be ſingle, or double, made by a priſoner, doth eſſentially differ by addition, alteration, or diminution, from the form preſcribed in the ſtatute, there the condition and obligation both are void. And therefore if ſuch a priſoner make an obligation to any other beſides the Sheriff, albeit he to whom it be made be called Sheriff; or if he make an obligation to the Sheriff himſelf, and not by the name of his office; or if he make an obligation to him by the name of his office, and doth not rightly name him; as if he make it to *I. S. vicecomiti in comitatu prædicto*, whereas it ſhould be *de comitatu prædicto*; all theſe obligations are void by this ſtatute. And if the Sheriff take an obligation of a priſoner for his appearance, in caſe where he is not bailable by the ſtatute, and ſo let him go free; or if he take an obligation of a priſoner that is bailable for his appearance, and doth inſert other things into the condition, as to pay money for meat, drink, or fees, or the like; or if he deliver a man in execution, and take bond of him to ſave him harmleſs, or to * be a true priſoner; all theſe, and ſuch like obligations as theſe, are void by this ſtatute. If a man be a priſoner in Ludgate upon a *Capias utlagatum*, and the gaoler take an obligation of him with two ſureties, with condition to ſave him harmleſs, and to diſcharge his fees, and to yield his body at all times upon ſummons, *&c.* this is a void obligation, as well againſt the ſureties, as againſt the principal. If the under Marſhall of the King's Bench take an obligation of one in execution and a ſtranger, with condition to ſave him harmleſs of all eſcapes, and ſo ſuffer the priſoner to go at large, this is a void obligation. If the Sheriff of Bedford, having a priſoner by force of an execution, let him go at large, and take an obligation of him, with condition that he ſhall keep the Sheriff without damage againſt the King and the plaintiff, and be at all times at the commandment of the Sheriff as a true priſoner, and appear before the juſtices of the King at *Weſtminſter*, *&c.* this is a void obligation.

Antley's caſe Hill. 7. Jac. Co. B.

Co. 10. 101.

Nowel's caſe Trin 21. Jac. Curia.

* P. 375.

Dier 118. 119.

Dier 324.

Plow. 61. 62.

If a man be a priſoner to the Sheriff for ſuſpicion of felony, and after a writ comes to him to have all his priſoners at a certain day before the juſtices of goal delivery of the ſame county, and thereupon the priſoner doth make a ſingle obligation to the Sheriff to appear before the Juſtices the day of the writ; this is a void obligation, becauſe it is ſingle and not with condition. And if the Sheriff bail one not bailable by a ſingle obligation, it ſeems this is a void obligation.

Fitz. Obl. 3.

6 How a ſingle obligation ſhall be taken.

A ſingle obligation is always taken moſt in advantage of the obligee and againſt the obligor: but it is otherwiſe of the condition of an obligation; for this is always taken moſt in advantage of the obligor, and againſt the obligee.

10 H. 7. 28 16.

If

Dier 19. 310. Co. 5. 119. 9. 53. old N. B. 62. Bro. Joint-tenancy 4, 16. Dec. 69.

If two, three, or more, bind themſelves in an obligation thus, *Obligamus nos*, and ſay no more, the obligation is and ſhall be taken to be joint only, and not ſeveral; but if it be thus, *Obligamus nos & utrumque noſtrum*; or *obligamus nos & unumquemque noſtrum*; or *obligamus nos & quemlibet noſtrum*; or *obligamus nos & alterum noſtrum*; in all theſe caſes, the obligation is both joint, and ſeveral; ſo as in theſe caſes the obligee may ſue all the obligors together, or all of them apart at his pleaſure; but it ſeems he may not ſue ſome of them and ſpare the reſt, but he muſt ſue them altogether, or all apart by ſeveral *precipes*; and in this caſe, he may have ſeveral judgments and ſeveral executions againſt the obligors, and take all their bodies in execution; but he ſhall have ſatisfaction but once, or from one of them only; for after he hath been ſatisfied by one, the reſt ſhall be diſcharged. But in the firſt caſe, where the obligation is joint and not ſeveral, the obligee muſt ſue all the obligors together, for he cannot ſue one alone with effect without the reſt, unleſs it be in ſome ſpecial caſes, as where one of the obligors alone doth ſeal the deed, or where all of them do ſeal, but one of them is an infant, a woman covert, a monk, or the like; * or where one of them is dead; for in theſe caſes, one, or ſome of them, may be charged without the reſt. But otherwiſe the plaintiff cannot proceed in his ſuit againſt one, or ſome of them, without the reſt, except the defendant give him advantage: for howſoever the ſuit be well begun, when one or ſome of them alone is or are ſued, (for it ſhall not be intended that the reſt are living, until it be ſhewed by the other party,) yet the defendant is not bound to anſwer, unleſs the reſt be ſued alſo; and therefore in this caſe, he or they that is or are ſued alone, are thus to take advantage of it, *viz.* to ſhew the matter to the court, and to plead in abatement of the writ: for if he appear and ſhew it not, but plead *non eſt factum*, or the like, to the obligation, the jury muſt find againſt him, and he will be charged with the whole debt. And ſo alſo if one appear, and the other make default and is outlawed, it ſeems he that doth appear muſt anſwer all (1).

Joint and ſeveral.

* P. 376.

Hil. 39. Eliz. B. R. Adjudged

Dier 14. 271. Executors and adminiſtrators ſhall be bound by the obligation of the obligor, albeit they be not named (2): but the heir of the obligor ſhall not be bound by the obligation, unleſs he be named in the obligation, *viz. obligo me, hæredes, &c.*

Executors. Heir.

See before If an obligation be made to one and his heirs, or to one and his ſucceſſors; the executors and adminiſtrators, not the heir, or ſucceſſor, ſhall take advantage of it.

Dier 350. If one bind himſelf in an obligation of 200*l.* to *A.* and *B. ſolvend.* 100*l.* to *A.* and 100*l.* to *B.* and *A.* die, it ſeems the executors of *A.* ſhall not have 100*l.* but that *B.* ſhall have the whole 200*l. ſed quære.*

Bro. Obligation 59. If one bind himſelf by obligation to *I. S.* to pay him an 100*l.* when *K.* doth come to his houſe, and at Michaelmas then next following 100*l.* more; Michaelmas then next following ſhall be taken for next following the making of the

For the time of payment.

(1) See more amply as to joint and ſeveral obligations, in *Com. Dig.* Obligations (F. and G.)—*Vin. Abr.* Obligations (G.) & (P.)—*Bac. Abr.* Obligations (D. 4.)

(2) See accordingly *Br. Abr.* Obligation *pl.* 15.—Alſo the ordinary ſhall be bound if he adminiſters, *ibid.* and *Vin. Abr.* Obligation (K.)

obligation, and not next following the coming of *K.* to his houſe.

If one bind himſelf to pay money upon a ſingle obligation, and doth not ſay when; in this caſe, it muſt be paid preſently (1). Dier 128. pet. 3. Juſtices Trin. 22. Jac. Co. B.

If one bind himſelf by obligation to pay money at Michaelmas, and doth not ſay which Michaelmas; this ſhall be taken for Michaelmas next after the date of the obligation; and ſo alſo it ſhall be taken in the condition of an obligation. Curia in the Marches of Wales Trin 8 Car.

7. How an obligation with a condition, or the condition of an obligation ſhall be taken. And how it muſt and ought to be performed.

If one bind himſelf to pay 20*l.* in the year of our Lord which ſhall be 1599. in and upon the thirteenth of *October* next enſuing the date of the obligation; this ſhall be taken to be due the 13th of *October* 1599. and not next after the obligation. See more *infra*. Agreed M. 9. Jac. B. R. Hil. 37 Eli. B. R. Sharplus verſus Haucklington.

The condition of an obligation when it is doubtful, is always taken moſt favourably for the obligor, in whoſe advantage it is made, and moſt againſt the obligee; yet ſo as an equal and reaſonable conſtruction be made according to the minds of the parties, albeit the words ſound to a contrary underſtanding. Dier 14. 51.

* P. 377.
First in reſpect of the perſons that are to do the thing.

* If ſomething be by a condition to be done, and it is ſet down indefinitely, and not ſet down who ſhall do it, if the obligee hath more ſkill to do the thing than the obligor, it ſhall be done by him; otherwiſe it ſhall be done by the obligor; as if a taylor be bound to me in an obligation with condition, that if I bring him three yards of cloth which ſhall be meaſured and ſhaped, and if he make me a cloak of it, *&c.* and it is not ſaid by whom it ſhall be ſhaped, this muſt be done by the taylor (2). Perk. ſect. 785.

Secondly in reſpect of the time when the thing is to be be done,

If the condition of an obligation be to pay money, or do any other tranſitory act to the obligee himſelf, and no time is ſet for the doing thereof, but a place only; this regularly muſt be done in convenient time, and that without requeſt. So alſo in caſe where the thing to be done is in its nature local, but yet ſuch a thing as may be done in the abſence of the obligee, and without his concurrence, as to acknowledge ſatisfaction on a judgment, make a leaſe for years, or the like, it muſt be done in convenient time, and that without requeſt. So alſo in caſe where the thing to be done is local, and the concurrence of both parties neceſſary thereunto, yet when it is to be done to a ſtranger and not to the obligee, as if the condition be that the obligor ſhall make a feoffment to *I. S.* it muſt be done in convenient time without requeſt. But where the thing to be done is local, and the concurrence of both parties neceſſary thereunto, and the act is to be done by the obligor himſelf, or by a ſtranger, to the obligee himſelf, as where the condition is that the obligor, or a ſtranger, ſhall infeoff the obligee; in this caſe, the obligor, or the ſtranger, ſhall have time to do it during his life, unleſs the obligee do haſten Co. ſuper Lit. 208. 2. 79. 80. 9. Ed. 4. 22. 9. H. 7. 16.

(1) That is, in convenient time, if the act is of a tranſitory and not of a local nature, as in the inſtance in the text of payment of money; or the delivery of charters or the like.—6 *Co.* 30. b.—*Co. Lit.* 208. b.—and *infra.*

(2) The contracts of parties are to be interpreted according to their intent and the ſubject matter; as if a taylor be obliged or promiſe to make a ſuit of cloaths for me, I ought to deliver him the cloth, for that it is uſual, and not for him to provide it: but if a ſhoe-maker be obliged to make a pair of ſhoes for me, he is alſo to find the leather, becauſe it is uſual, *per cur'* in *Oats* v. *Thornhill*, 1 *Lev.* 93.——ſee further by whom and to whom the condition of an obligation is to be performed, in *Bac. Abr.* Obligations (F. 3.)

it by requeſt, and if he requeſt it ſooner, then it muſt be done in convenient time after requeſt made. And yet if the thing to be done, be to be done wholly by the obligor, or a ſtranger, and doth nothing concern the obligee, as where the condition is that the obligor ſhall go to *Rome*, or that *I. S.* ſhall preach at *Paul's* croſs, or the like; in the firſt caſe, it may be done at any time during the life of the obligor; and in the laſt caſe, it may be done at any time during the life of *I. S.*; and requeſt in this caſe ſhall not haſten it.

Co. 2. 80. ſuper Lit. 208. If an obligation be with condition to grant a rent, or an annuity, to the obligee during his life, to be paid at Eaſter, and no time is ſet for the doing of it; this rent muſt be granted before Eaſter next after the obligation, or elſe the obligation will be forfeit. And if the condition be to grant an advowſon, and no time is ſet for the doing thereof; it muſt be done before the church become void, or otherwiſe the obligation ſhall be forfeit.

Dier 77. If the condition be to do a thing upon a day in the year, and there be two days of that name in the year; in this caſe, it ſeems, it muſt be done that day that is furtheſt off from the time of the making of * the obligation, eſpecially if that day be the more notorious of the two days. * P. 378.

Adjudged M. 20 Jac. B R. Preſcot's caſe. If the condition be to pay 10*l.* the eleventh of *May* next following, and the obligation is dated the 5th of *May*; in this caſe, the money muſt be paid the 11th day of the ſame month of *May*, and not of the next month of *May* (1).

22 Ed. 4. 25. If the condition be to ſtand to the award of *I. S.* and *I. S.* award money to be paid, but ſet no time for the payment of it; this muſt be paid in convenient time, elſe the obligation ſhall be forfeit.

Perk. ſect. 397. 799. If one be bound to me in an obligation with condition, that, if I enfeoff him of *White-acre*, he will pay me 10*l.* but doth not ſay when; this muſt be done as ſoon as I make him the feoffment. So if one be bound to me that if the goods I have delivered to *B.* ſhall be loſt, that *C.* ſhall ſatisfy me for them, and doth not ſay when; this ſhall be preſently after the looſing.

M. 2. Jac. B. R. Crauſdenet Morſes caſe. If the condition be to pay *I. S.* money when he ſhall come to the age of twenty-one years; in this caſe, it muſt be paid the very day *I. S.* doth come to his full age, and payment after is not a ſufficient performance of the condition.

39 Eliz. B. R. Fitz. Barre. 92. If the condition be, to come at a day to ſuch a place to do a thing, and the thing cannot be done without the concurrence of the other party; in this caſe, the obligor muſt ſtay until the very laſt inſtant of the day for his coming; and it ſeems alſo he muſt ſtay at the place all the day long.

Adjudg. Paſ. 39 Eliz. If the condition be to pay a rent at Michaelmas or within twenty days after, the obligation is not forfeit before the twenty days be paſt.

Bro. Condition 145. Dier 17. 7. Ed. 4. 3. If one be to do a thing on a day certain, he may do it any part of the day whilſt the light doth laſt; and if the condition be to do a thing by, or before a day, it may be done the laſt inſtant of the day before, and it is ſufficient (2).

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(1) Adjudged accordingly *Cro. Jac.* 646.—but a writ of error being brought, the parties compounded.—ſee further in *Buckley* v. *Guildbank*, *Cro. Jac.* 677.

(2) See accordingly *verbatim* in 1 *Wood* 773.—and more amply as to the time when the condition of the obligation is to be performed, *ante p.* 131.—and in *Bac. Abr.* Obligation (F. 4.)

3. In respect of the place where the thing is to be done.

If the condition of an obligation be to pay money, or do any like transitory act to the obligee on a day certain, but no place is set down where it shall be done; in this case, it must be done to the person of the obligee wheresoever he be; and for this purpose, the obligor must at his peril seek out the obligee, if he be *intra quatuor mœnia*, otherwise the obligation is forfeit; but if the obligee be not within the kingdom at the time when the thing is to be done, he is not bound to seek him, so neither is the obligation forfeit for not doing of the thing. So if one grant an annuity to another, and doth not set down where it shall be paid, and gives a bond with condition for the payment thereof; in this case, it must be done to the person of the obligee where ever he be: and the like law is, as it seems, where the thing to be done by the condition, is to be done by or to a stranger: but when the thing the party is bound by the condition to do is local, he is not bound to go any * further, or to any other place, but to the place itself; and therefore if the condition be to make a feoffment of a piece of land, the party that is bound to do it, is not bound to go to any other place, but to the piece of land to do it: and if a man make a feoffment in fee, or lease for life or years of land, rendring rent generally, and gives an obligation with condition for the payment of the rent, the feoffee, or lessee, is not bound to go to any place from the land to seek the feoffor or lessor to pay him this rent.

Perk. sect. 780, 781. 7 E. 4. 4. 22 Ed. 4. 25. Lit. sect. 340. 341.

* P. 379.

If the condition be, to deliver twenty quarters of corn such a day to the obligee, and no place is set down where it shall be delivered; in this case, it is sufficient if the obligor, when the corn is ready, do give notice thereof to the obligee, and to wish him to appoint a place whereunto the obligor may bring it, and if he refuse to appoint a place, it is at his own peril; or the obligor may bring the corn to the house of the obligee (and this is the safest way) and if the obligee refuse it, the condition is performed, and the obligation is discharged (1).

Perk. sect. 785.

4. In respect of the thing itself to be done.

If the condition be, to perform all the covenants in an indenture; this shall be taken as well for the covenants in law, as for the covenants in deed.

Co. 4. 80. Dier 257.

To perform covenants.

If a lease be made of a manor, excepting a close, and the lessee make an obligation to the lessor with condition, that the lessee shall perform *omnia & singula in scripto prædicto contenta*; by this the close shall be taken to be within the condition, so that if the lessee disturb the lessor in the close excepted, this shall be a breach of the condition.

Plow. 67.

To make a feoffment, lease, &c.

If the condition be, to make a feoffment to the obligee of land; in this case, the feoffment may be made with, or without writing, and if it be made by writing, it may be made without any warranty or covenants, and this will be a sufficient performance of the condition (2).

See Covenant, Num. 6.

If the condition be, that the obligor shall make a lease to the obligee for twenty years, and it is not set down when the lease shall begin, it shall begin presently.

Co. 6. 33.

To make a release, or other assurance.

If the condition be, that the obligor shall do any act upon request that the counsel of the obligee shall think reasonable,

Dier 218.

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(1) See further at what place a condition must be performed, in *Bac. Abr.* Obligations (F. 5.)

(2) Before the statute of 29 *Car.* 2. *c.* 3.—but since that statute a feoffment must be in writing as was observed before in *page* 204.

as

as for example, ſhall do any act, *&c.* for the releaſing of an obligation, wherein the obligee is bound to the obligor, and the obligee by adviſe of counſel deviſeth and requeſteth a releaſe of all demands to the obligee, and to *I. S*; in this caſe, the obligor may refuſe to ſeal it, albeit it be deviſed by the counſel of the obligee, becauſe it is unreaſonable, for it muſt be a reaſonable act that the obligor by this condition is bound to do.

Adjudg. Hil. 39 Eliz. Co. B. If the condition be to pay 10*l.* at Michaelmas next, and 10*l.* yearly after, until *I. S.* be made knight; in this caſe, albeit *I. S.* be * made knight before Michaelmas, yet the firſt 10*l.* at Michaelmas muſt be paid. To pay money of rent. * P. 380.

Adjudge M. 18 Jac. B. R. Harbert v. Rockſey. If the condition be thus, that if the obligor ſhall for ever pay yearly to the obligee, *&c.* 10*l.* at the two uſual feaſts by equal portions, or if his heirs ſhall at any time hereafter pay 100*l.* at one payment to the obligee, that then the obligation to be void; in this caſe, albeit the obligor hath election, which of theſe two things to do; yet, becauſe the intent is apparent that one of theſe things ſhould be done, if therefore the 100*l.* be not paid before the firſt feaſt, the 10*l.* muſt be paid yearly.

Dier 42. 43. If the condition of an obligation from *A.* to *B.* be thus; that whereas *A.* hath ſold to *B.* certain meadow in *Dale*, that the ſaid *A.* ſhall warrant the ſame againſt the Lord and King and all others, if the ſaid *B.* ſhall peaceably enjoy it to him, and his heirs of the Lord of the manor of *M.* by the ſervices due after the cuſtom, *&c.* in this caſe, the ſubſtance of this being for quiet enjoying, it ſhall be extended that way, and albeit it be not ſaid what he ſhall warrant, yet it ſhall be taken to be the land in queſtion, and the warranty ſhall be conſtrued to laſt only for the life of *B.* and not to extend to any new titles after the covenant, eſpecially ſuch as are by the act and default of the obligee himſelf, as if he commit a forfeiture and the Lord enter, or the like. To warrant land and for quiet enjoying.

Perk. ſect. 791. 10 Ed. 4. 11. Gold's caſe in Herbert's Rep. 127. If the condition be, that the obligor ſhall ſufficiently prove ſuch a thing; this ſhall be taken for proof by inqueſt, and accordingly it muſt be done: but if the condition be that it ſhall be done by ſuch a time, or before ſuch perſons, as when or where ſuch proof cannot be had, then it is otherwiſe. Where the word [proof] is put generally, it ſhall be underſtood of proof by juſtice; but when the parties agree upon another form of proof, that ſhall prevail againſt that which is but inſtruction of law. To prove a thing.

Curia Trin. 7 Jac. Co. B. If one be bound in an obligation with condition to ſuffer his wife to give to her kinsfolks, children, or others, portions of his goods to the value of 100*l.* and that he will perform it, and ſhe give part to one and part to another; in this caſe, the huſband muſt perform it accordingly: but if the condition be to ſuffer her to give to *A.* and *B.* 100*l.* and that he will perform it, and ſhe give 100*l.* to *A.* he is not bound to perform this. To ſuffer his wife to make a will.

Adjudg. Hil. 7 Jac. B. R. If the condition be, that he ſhall perform his wife's will, ſo it do not exceed 20*l.* and ſhe make a will and deviſe 100*l.*; in this caſe, he is not bound to perform the will for the twenty pounds.

Kelw. If the condition of an obligation be, that the obligor ſhall infeoff the obligee, and ſuch others as he ſhall name, by a day; in 5. In reſpect of the manner and order of doing the thing and other matters.

in this case, the obligee must do the first act, *viz.* name the others; otherwise the obligor doth not forfeit his obligation by the not doing of it: but if the condition be to infeoff me, or such others as I shall * name, before such a day; in this case, if I do not name others, it seems he must infeoff me before the day at his peril.

* P. 381.

If the condition be, that the obligor shall make such an estate of land as *I. S.* shall advise; *I. S.* must first advise, and this must be made known unto the obligor ere he is bound to do any thing, and if he never advise, he is never bound to do any thing; for it is in this case, as if one be bound to stand to the award of *I. S.* and *I. S.* never make any, or make a void award, which is all one. Co. 5. 25. 7. Ed. 4. 13. Perk. sect. 775.

If the condition be, to make such a discharge in such a court as the obligee or his counsel shall advise; in this case, the obligee must do the first act, *viz.* advise and give notice of the advice to the obligor before he is bound to do the thing. But if the condition be to make such a discharge in such a court such a day, as the judge of that court shall advise; in this case, the obligor must at his peril procure the judge to advise a discharge, and it must be done that very day, or the obligation will be forfeit. Co. 5. 23.

If the condition be, to pay 20*l.* to the obligee when he doth come to *London*; in this case, the obligee must do the first act, *viz.* make known to the obligor when he doth first come to *London*, for otherwise, it seems the obligor is not bound to pay the money. Per. Just. Nichols, M. 13 Ja. Co. B.

If the condition be, that the obligor shall levy a fine to the obligee before such a day, the obligee must do the first act, *viz.* sue out the writ of covenant. Co. 5. 127. Dier 371.

If the condition be, that the obligor shall deliver twenty cloths to the obligee such a day, the obligee paying for every cloth immediately after the delivery 20*l.*; in this case, the cloths must be delivered, albeit the obligee refuse to pay the money; but if [immediately after] be left out, it seems the obligor is not bound to deliver the cloth unless the obligee first pay the money. 21 Ed. 4. 52.

If the condition be, that the obligor and his heirs shall at any time, upon request made, do any act, *&c.* that the obligee shall require. *&c.* and the obligee tender a release or other deed to seal; in this case, if the obligor, or his heir that is to seal the deed, be an illiterate man, he may refuse to seal it, until he can get some body to read it unto him; but he may not refuse or delay to seal it until he can have a lawyer's advice upon it, for thereby he will forfeit his obligation. Co. 2. 3. 4. Dier 337.

If the condition be, to do any thing upon request; the obligor until request made is not bound to do any thing towards it, neither can he forfeit his obligation till then. And yet if, in this case, the obligor disable himself to do the thing he hath undertaken to do upon request, before the request made, the obligation may be forfeit without any request made. Perk. sect. 773. Co. 5. 21.

* P. 382.

* If the condition be, that the obligor shall within a certain time surrender such land of his, for an annuity of so much as they shall agree upon, and they agree upon 10*l. per annum*; in this case, the obligor is not bound to make the surrender until the annuity be made and tendred unto him. 14 H. 8.

Hil. 37 Eliz. Co. B. Greeingham's case adjuag.

If the condition be, to deliver to the obligee an obligation wherein the obligee is bound, &c. or to seal and deliver to the obligee such a release of it as shall be devised by the counsel of the obligee before Michaelmas, and the counsel do not advise any release before Michaelmas; in this case, the obligor is discharged of the obligation, for the obligee is to do the first act.

Trin 4. Jac. B. R.

If *A.* be bound to *B.* in an obligation with condition, that *A.* and his wife shall levy a fine of land to *C.* and *D.* and their heirs, and at their costs and charges; this shall be construed to be at the costs of the obligor, and not at the costs of the conusees, but if the word [and] be omitted, perhaps it may be otherwise.

Dier 17.

If the condition be thus, that if the wife die before Michaelmas without issue of her body then living, that the obligation shall be void; in this case, [then living] shall relate *ad proximum antecedens*, and not to the death of the wife, and therefore if she hath issue and die, and after, before Michaelmas, the issue dyeth also, the obligation is void.

Gold's case, M. 13 Jac.

If the condition be, that if the obligor shall waste the goods of the obligee (his master), and this waste within three months after due proof of it, either by confession or otherwise, be notified to the obligor, that the obligor shall satisfy the obligee for it, and the obligor do confess the waste under his hand and seal; in this case, it seems, this proof though it be *extrajudicial*, is sufficient.

Co. 5. 22. super Lit. 207. Dier 262. 15 H. 7. 2. 4 H. 7. 4.

When the condition of an obligation is to do two things by a day, and at the time of making of the obligation both of them are possible, but after, and before the time when the same are to be done, one of the things is become impossible by the act of God, or by the sole act and laches of the obligee himself; in this case, the obligor is not bound to do the other thing that is possible, but is discharged of the whole obligation. But if at the time of the making of the obligation one of the things is, and the other of the things is not possible to be done, he must perform that which is possible. And if in the first case one of the things become impossible afterwards by the act of the obligor, or a stranger, the obligor must see that he do the other thing at his peril. And when the condition of an obligation is to do one single thing which afterwards, before the time when it is to be done, doth become impossible to be done in all or in part, the obligation is wholly discharged; and yet, if it be possible to be done in any part, it shall be performed as near to the condition as may be.

Conditions impossible.

21 Ed. 3. 29.

If the condition be, to do one of two things, as to make a feoffment to me, or pay me 20*l.* in this case, if the obligor do either of them, it is sufficient. But if the condition be in the copulative, as to enfeoff me and pay me 20*l.* in this case the doing of one of them will not suffice, but he must do both.

* P. 383.

Per. Justice, Dodridge M. 2. Car. B. R.

If the condition be, to pay to *A. B.* and *C.* 30*l.* a-piece within a week after they come to eighteen years of age, or within forty days after their days of marriage after notice given thereof, which shall first happen; in this case, this notice must go to both the parties, so that notice must be given when they are eighteen years of age; otherwise, and until notice given,

given, it seems the obligor is not bound to pay the money. See more in *Condition, numb.* 80 and *Covenant, numb.* 6.

8. When the condition of an obligation shall be said to be performed, and the obligation saved; or not.

The matter of a condition of an obligation is sometimes affirmative and compulsory, and doth consist of something to be done, and sometimes it is negative and restrictive, and doth consist of something not to be done; the not doing in the first case, and the doing in the latter case, causeth the obligation to be forfeit; and the doing in the first case, and not doing in the latter, saveth the obligation.

To make a feoffment.

If one be bound in an obligation to me, with condition to enfeoff me of land, and the obligor do first make a lease to me of it, and afterwards he doth make a release of it to me and my heirs; this is a good performance of the condition. Co. super Lit. 207. Plow. 67. 17 Ed. 4. 3.

Tender and refusal.

If a condition be to make me a feoffment of land, and he tender me a feoffment, and I refuse it; by this the condition is performed. So if the condition be, to make a feoffment to my use, and when it is made I refuse it; this is a good performance of the condition. But if a man bind himself in an obligation to me, with condition to make feoffment to a stranger and he tender the feoffment to the stranger, and he doth refuse it; this is no good performance of the condition, but the obligation is forfeit. If the condition be, to infeoff me and my wife, and he tender it to me, and I refuse it; it seems this is a good performance. Perk. sect. 784. Fitz. Barre 82. Perk. sect. 738. 15 Ed. 4. 5.

If one bind himself in an obligation to me, with condition to make me a feoffment of the manor of *Dale* by a day, and he, before the day, grant a rent-charge out of the same manor to a stranger, and afterwards, and before the day also, he doth make me a feoffment of the land; this is a good performance of the condition, and the grant of the rent no breach thereof. But if the obligor sell away part of the manor before, or make a feoffment to me but of a moiety or a third part of the manor; this is no good performance of the condition. And if in this case, the obligor before the day take a wife, and before the day make his feoffment according to the condition, but the marriage doth continue until after the day; in this case, it seems the condition is broken. 3 H. 7. 4. 4 H. 7. 4. Perk. sect. 757.

* P. 384.
Acceptance.

* If the condition be, that the obligor shall enfeoff me of the manor of *Dale*, and he make a feoffment of the manor of *Sale*, and I accept thereof; it seems this is no performance of the condition, and that my acceptance in this case will not help. So if the condition be to make me a feoffment of land, and he give me money, a horse, or the like, in recompence of this, and I accept thereof; this is no good performance of the condition: and the like law is in all cases where the condition is to do any collateral thing, as to account, build a house, enter into a recognisance, or the like, and the obligor doth give, and the obligee accept, some other thing in lieu thereof: and so also it is where the condition is to make a feoffment to a stranger, and the obligor give, and the stranger take, another thing in lieu thereof: but if the condition be to enfeoff me of land such a day, and he make, and I take, the feoffment before the day; this is a good performance of the condition. Perk. sect. 749. 759. Dier 1. Perk. sect. 751. 9 H. 7. 17. 3 H. 7. 4. 27. H. 8. 1. 14 H. 8. 15. 10 H. 7. 14.

If the condition be to enfeoff me or my heirs in the disjunctive, and the obligor enfeoff me and my heirs; this is a good performance of the condition; for it is impossible to enfeoff my heirs whilst I live, and when two things are to be done 14 H. 8. 15. Co. 5. 118.

done by a condition, whereof the one is poſſible at the time of making the obligation, and the other is not; in this caſe, it is ſufficient if he do the thing which is poſſible.

21 Ed. 3. 39. If the condition be, to make me a feoffment, or pay me 20*l.* if the obligor do either of them, it is ſufficient. But if the condition be to infeoff me, and pay me 20*l.* in this caſe, the obligor muſt do both, or the condition will not be performed. *Et ſic de ſimilibus.*

Perk. ſect. 776. Kelw. 95. To make an eſtate. If the condition be, that the obligor ſhall make me a ſufficient eſtate of land by the advice of *W.* and *S.* and they adviſe an inſufficient eſtate, and the obligor do make the eſtate according to that advice; this is a good performance of the condition: but if the condition be that the obligor ſhall make a good and ſure eſtate, and he by advice of counſel make an eſtate that is not good and ſure; this is no good performance of the condition.

Fitz. Barre, 354. If the condition be, that the obligor ſhall make me an eſtate of land, and make the eſtate to another by my appointment; it ſeems this is no performance of the condition.

Trin. 17. Ja. B. R. If the condition be, that the obligor or his feoffees in truſt ſhall make an eſtate to the obligee ſuch a day, and the feoffees do it without the conſent of the obligor; this is no performance of the condition.

Paſche 8. Ja. Co. B. To make further aſſurance. If the condition be, to make further aſſurance, and the obligor make further aſſurance upon condition, without the agreement of the other party; this is no good performance of the condition.

37 H. 6. 18. Perk. ſect. 792. To ſave harmleſs. If the condition be, to ſave me harmleſs from an annuity wherewith my land is charged, and the obligor doth pay the ſame yearly, * and get me an acquittance for the ſame from the party; this is a good performance of the condition. But if the condition be to diſcharge me of ſuch an annuity; in this caſe A payment, and procuring me a releaſe, is no good performance of the condition.

* P. 385.

Perk. ſect. 790. Fitz-Barre 7. To grant a rent, or to procure a rent to be granted. If the condition be, that the feoffees or leſſees of the obligor of ſuch land which they have in truſt, ſhall grant me a rent-charge, or releaſe their right to me before ſuch a day, and there be three feoffees or leſſees, and two of them only do grant this rent or make this releaſe; this is no good performance of the condition.

Dier 15. Fitz. Barre, 77. If the condition be, that the obligor ſhall purchaſe and procure to me and my heirs a rent of 5*l. per annum*, and a ſtranger hath ſuch a rent out of my land, and he doth get him to releaſe this to me; this is a good performance of the condition: and if one be bound with condition to grant me the rent and farm of ſuch a mill before Michaelmas, to be had and perceived until I be paid 10*l.* and before that time he leaſe the mill to me at a rent, and then ſuffer me to detain ſo much of the rent; it ſeems this is a good performance of the condition.

Co. ſuper Lit. 207. To deliver a horſe. Tender and refuſal. If the condition be to deliver me a horſe, and the obligor tender the horſe unto me, and I refuſe him; hereby the condition is performed: and ſo in all ſuch like caſes where the obligor is to do any collateral thing, as ſtand to an award, or the like; if the obligor offer to do it, and the obligee refuſe, the condition is performed, and the obligation diſcharged for ever.

Dier 17. ſuper Lit. 202. Bro. Condition 145. To pay money. If the condition be, to pay money at a day certain, and the obligor pay a little before night, time enough for the receiver

to

to ſee to number his money by day-light; this is a good performance of the condition. And if the condition be to pay money by or before a day, payment in the laſt inſtance of the day before, is a ſufficient performance of the condition (1).

Acceptance.

If the condition be to pay me a ſum of money at a day certain, and the obligor pay me leſs money before the day, or all the money before or at the day, or give me ſomething elſe before or at the day of payment in lieu thereof, or pay me all the money or a leſſer ſum at the day appointed, but in another place, and not the place mentioned in the condition, and I accept thereof; in all theſe caſes, the condition is well performed. But if a ſtranger to the condition do ſo, and I accept thereof; this is no good performance of the condition, as hath been adjudged. And if the obligor pay leſs than the whole money at the day of payment, and the obligee accept thereof; this is no good performance of the condition: and if the thing to be done be a collateral thing, as to account or the like, and the obligor give unto the obligee money, or a horſe in lieu thereof, and the obligee accept it; this is no good performance * of the condition. And if the obligor pay the money to the obligee after the day of payment; this is no performance of the condition, but the obligation is forfeit, and the money paid ſhall go in part towards the forfeiture: and yet in this caſe, the defendant at this day, being ſued upon this obligation, doth uſually adventure to plead conditions performed, and give this ſpecial matter in evidence to the jury, who for the moſt part doth find againſt the obligee. And yet if the condition be, to pay me money at a day certain, or to pay another money at a day certain, and the obligor pay me or the ſtranger at ſeveral times before the day, and I, or the ſtranger, accept thereof; this is a good performance of the condition.

Tender and refuſal.

But if the obligee do only promiſe to accept of a horſe for his money at the time of payment, and when the time of payment comes, and a tender of the horſe is made to him, he doth refuſe him: this tender is not a ſufficient performance of the condition.

If the condition be, to pay money at a day and place certain, and the obligor tender it at the time and place, and the obligee is not ready to receive it; or, being ready, doth refuſe to receive it; this is a good performance of the condition to ſave the forfeiture of the obligation: and yet, if the obligor be afterwards ſued for this money, he muſt ſay in his pleading, that he is ſtill ready to pay it, and he muſt tender it in court. But if one be bound by a ſingle obligation to pay money, and after at the ſame or ſome other time, he hath a defeaſance from the obligee, that upon payment of a leſſer ſum the obligation ſhall be void, and the obligee refuſe the money when the ſame is tendred, at the time when by the defeaſance it is to be paid; in this caſe, the obligor is not bound to tender the money in court, neither hath the obligee any remedy for it.

Perk. ſect. 748. 34 H. 6. 17. 21 Ed. 3. 13. Co. 5. 117. 9. 79. Bro. Obl. 64.

Trin. 36. Eliz.

Adjudged 7 Eliz.

* P. 386.

Dier 18.

18 Ed. 4.

Co. ſupet Lit. 208. 209. 27 H. 8. 10. Perk. ſect. 784.

(1) And if the money was not paid at the day, the bond became forfeited, and the whole penalty became recoverable at law: and the obligor was obliged to have recourſe to a Court of Equity, which would reſtrain the obligee from taking more than in conſcience he ought, *i. e.* his principal, intereſt, and coſts.—The ſtat. of 4 *Ann. c.* 16. §. 13. affords the like aſſiſtance to obligors, as the 7 *Geo.* 2. *c.* 20. (mentioned before in note 2 to page 137.) does to mortgagors; for it enacts, that if at any time, pending an action on bond with a penalty, the defendant ſhall bring into court the principal, intereſt, and coſts, the money ſo brought into court ſhall be in full diſcharge of the ſaid bond, and the court may give judgment for the defendant accordingly.

If

41 Ed. 3. 25. If the condition be, to pay me money at a day and place certain, and the obligor doth tender it to me the ſame day in another place, this is no performance of the condition; and therefore in that caſe I may refuſe it.

Dier 17. If the condition be, to pay money between two days; payment of the money upon either of thoſe days, is not a good performance of the condition; but the payment muſt be between the two days.

Perk. ſect. 748. 27 H. 6. 6. Fitz. Barre. 43. If the condition be, to pay me money at a day certain, and I bid the obligor pay the money to one that I do owe ſo much more unto; or I bid him lay out the money for me; or I bid him keep it for ſuch a debt I owe unto him; and he do ſo, and I accept hereof; it ſeems this is a good performance of the condition.

If the condition be to pay me money, and I appoint another * to receive it, and the obligor pay it unto him; this is a good performance of the condition. * P. 387.

Co. ſuper Lit. 208. 209. Dier 56. Acceptance. If the condition be, that a ſtranger ſhall pay to the obligee 10*l.* and the obligee accept a horſe for it; this is a good performance of the condition. But if the condition be, that one ſtranger ſhall pay to another ſtranger 10*l.* and the one doth give, and the other take, a horſe in lieu of this; this is no good performance of the condition.

New terms of the law. tit. Coin. a Per Juſt. Bridgman & Curia in the Marches of Wales 8. b Terms of the law, Idem. If the condition be, to pay me 20*l.* of lawful Engliſh money, and the obligor pay me in Spaniſh or in any other money current in this realm; this is a good performance of the condition. [a] But payment in farthings is no good payment (1). [b] If the condition be, to pay me 20*l.* and the obligor pay me ſome of the 20*l.* in counterfeit pieces, which I, not perceiving at the time, do put up and accept, but after upon a review I do perceive ſome of them to be naught, and thereupon I do ſend it back to him again; in this caſe, it ſeems the condition is well performed, and therefore the ſending back of the money again will not cauſe a breach afterwards.

22 Ed. 4. 2. To ſtand to an award. If the condition be, that I ſhall ſtand to the award of *I. S.* and he doth award me to pay 20*l.* to *W. S.* by a day, and at the day I do tender him the 20*l.* but he doth refuſe it; in this caſe, I have ſufficiently performed the condition, and the obligation is ſaved.

22 Ed. 4. 25. If the condition be, that I ſhall ſtand to the award of *I. S.* and he award that I ſhall enter a *Retraxit* in a ſuit depending between me and the other party, and I do not ſo, but am nonſuit, or do diſcontinue my ſuit; this is no good performance of the condition.

22 Ed. 4. 40. To ſhew a releaſe. If the condition be, that the obligor ſhall come ſuch a day to ſuch a place, and ſhew me a releaſe, and he doth come to the place the latter part of the day, and doth ſtay there until the light of the day be gone, ready to ſhew his releaſe, but I come not thither; this is a good performance of the condition.

Dier 255. 17 Ed. 4. 3. For quiet enjoying. If one make a leaſe of land to me, and bind himſelf in an obligation with condition, to ſuffer me quietly to enjoy the land without the let of him or any other; in this caſe, if neither he himſelf, nor any other by his incitement, do diſturb me, the condition is performed; and if a ſtranger that hath title, do

(1) See accordingly *Wood's Inſt.* 292.—Money of *England* muſt be either of gold or ſilver, 2 *Inſt.* 577.

enter without his procurement or occaſion, this is no breach of the condition.

To appear.

If the condition be, to appear in the King's-Bench ſuch a day, to anſwer *I. S.* and at the day the obligor doth appear, but the plaintiff is eſſoined, ſo that the defendant cannot anſwer him; or the ſuit is diſcontinued by the demiſe of the King before the day of appearance; in theſe caſes, the condition is performed and the obligation ſaved. But if the obligor in this caſe, when he doth * appear, doth not cauſe his appearance to be entred of record, the obligation is forfeit.

Perk. ſect. 760. 758. 2 Ed. 4. 3.

* P. 388.

If the condition be to appear *coram domino rege*, and the obligor appear before the King's perſon; this is no performance of the condition. And if the condition be, to appear *coram juſticiariis domini regis*, and the obligor appear before them out of court; this is no performance of the condition.

8 H. 4. 6.

To make a bond.

If the condition be, that a ſtranger ſhall make an obligation to the obligee, and the ſtranger tender it, and the obligee refuſe it; this is a good performance of the condition: but if the condition be, that the obligor ſhall make an obligation to a ſtranger, and the obligor tender it, and the ſtranger refuſe it; this is no performance of the condition.

Co. ſuper Lit. 208. 209. 10 H. 6. 16. 27 H. 8. 2.

To marry a woman.

If the condition be, that the obligor ſhall marry the daughter of the obligee by a day, and he doth tender himſelf, and ſhe doth refuſe; in this caſe, the obligation is forfeit, notwithſtanding this tender and refuſal.

Perk. ſect. 756. 4 H. 7. 3.

To leave poſſeſſion.

If the condition be, to deliver the key of a houſe, and the quiet poſſeſſion to *I. S.* to the uſe of the obligee, and the obligor (the houſe being rid, and every one out of the houſe, and the door locked) doth deliver the key to *I. S*; it ſeems this is no good performance of the condition, but that *I. S.* or the obligee, or his deputy, ought to come and receive the poſſeſſion. See more in *Condition* at *numb.* 9. and *Covenants* 6. (1).

Dier 219.

9. When a ſingle obligation ſhall be ſaid to be broken and forfeit, or not.

If an obligation that is ſingle, be not performed; as when it is to pay money at a day, and the money is not paid; the obligation is broken. But if a man be bound by an obligation to pay money at ſeveral days, the obligation is not forfeit, nor can be ſued, until all the days be paſt. And yet if the condition of an obligation be to pay money at ſeveral days, and the obligor do fail to pay the money the firſt day; in this caſe, the obligee may ſue for the money due by the obligation preſently.

Co. 8. 153. ſuper Lit. 292. F. N. B. 267.

If one be bound to pay money at a day certain by a ſingle obligation or bill, and the obligor tender the money at the day to the obligee, ſo as he will give him his bill or a releaſe for the money, and the obligee refuſe ſo to do, and thereupon he doth refuſe to pay the money; in this caſe, the obligation is not forfeit; for, in this caſe, the obligor is not bound to pay the money, unleſs the obligee will give up his bill, or give him a releaſe. But otherwiſe it is in caſe where one is bound to pay money by the condition of an obligation; for there the obligor muſt pay the money at his peril, albeit the obligee refuſe to deliver up the obligation, or to give him a releaſe.

B. o. Obli. 62. Fait. 105. Fitz. verdict 13.

If one be bound to pay money on a ſingle bill at a day, and the obligor tender the money at the day to the obligee, and he

(1) See accordingly *verbatim* in 1 *Wood* 776 to 779.—and more amply as to the performance or the breach of a condition in obligations—in *Bac. Abr.* Obligations (F. 1.)—*Vin. Abr.* Condition (Q. a.)

refuſe

refuſe * it; in this caſe, it ſeems, he hath no remedy for his money; *Sed quære.* * P. 389.

Bro. Oblig. 17. In all caſes when the condition is not performed, or is broken, the obligation is forfeit, and till then it cannot be forfeit: and therefore, if one be bound in an obligation, with condition to pay me 10*l.* at Eaſter; before the day come, the obligation cannot be forfeit; but if it be not paid at the day, the obligation is forfeit: and yet if the obligee himſelf be the cauſe of the breach of the condition, or the thing to be done by the condition is now become impoſſible by the act of God, the obligation is now become without penalty: as if in the old days I had been bound in an obligation to an Abbot, that *A.* ſhould infeoff him before Chriſtmas; if *A.* enter into religion, my bond had been preſently forfeited: but otherwiſe it had been if *A.* had been profeſſed under the obedience of the obligee himſelf.

4 H. 7. 4.

10. When the condition of an obligation ſhall be ſaid to be broken, and the obligation forfeit; or not.

Perk. ſect. 768, 769. If the condition be to make a feoffment of land to me ſuch a day, and he be not upon the land ready to make the feoffment; albeit I come not there to receive it, yet the condition is broken.

To make a feoffment.

21 Ed. 3. 29. Co. 5. 112. If the condition be that, when the obligor ſhall come to his aunt, he will infeoff the obligee, or the heirs of his body; in this caſe, he muſt do it as ſoon as he doth come to her and the obligee ſhall requeſt the feoffment, or the obligation is forfeit.

21 Ed. 4. 55. If the condition be to infeoff me of a manor by a day, and before the day the obligor doth make a feoffment of it to another; hereby the condition is broken, and the obligation forfeit: and though the obligor repurchaſe it again before the day, and then make the feoffment, yet this will not cure the breach.

4 H. 7. 4. If the condition be, to enfeoff *B.* and *C.* and one of them die before the time be paſt wherein it ſhould be done; in this caſe, he muſt enfeoff the ſurvivor of them, or the condition is broken.

Dier 347. If the condition be, that if the obligor before Michaelmas make a leaſe to the obligee for thirty-one years, if *A.* will aſſent, and if he will not aſſent then for twenty-one years, that then, *&c.* if *A.* do not aſſent, and the leaſe for twenty-one years be not made before Michaelmas, the obligation is forfeit.

To make a leaſe.

7 H. 6. 24. If the condition be, that the obligor ſhall make me an eſtate upon requeſt, and he tender me an eſtate before I requeſt it, and afterwards I do requeſt it, and he doth refuſe it; in this caſe, the condition is broken, and the obligation forfeit.

To make an eſtate.

Paſche 8. Co. B. Jac. If the condition be, that the obligor ſhall make me a good eſtate of land (being copyhold land) and he doth ſurrender it abſolutely, and the homage, when they preſent it, do preſent it conditionally; this is no breach of the condition.

4 H. 7. 4. Kel. * If the condition be, to make a good eſtate of land in fee-ſimple to *A.* (a woman) before ſuch a time, and before ſuch time the obligor taketh *A.* to wife, and the day paſs, and no eſtate is made; in this caſe, the condition is broken, and the obligation forfeit. But if the obligation be made to the woman herſelf, then it is diſpenſed with by the inter-marriage. * P. 390.

Co. 2. 3. Dier 337. If the condition be, that the obligor and his ſon ſhall do all ſuch acts for the better aſſuring of land, as the obligee or his counſel ſhall deviſe; and the obligee deviſe and tender a releaſe to the obligor and his ſon to ſeal, and they delay and refuſe to ſeal it, until they can ſhew it to their counſel to be adviſed upon it; this is a breach of the condition: but if they be illiterate and

To make further aſſurance.

and refuſe to ſeal it until they can get it read; this is no breach of the condition.

To ſave harmleſs.

If the condition be, that the obligor ſhall ſave the obligee harmleſs from ſuch a debt, for which the obligee is ſurety for the obligor, and the obligee cometh at the time, and to the place, when and where the money, for which he is engaged, is to be paid, and finding no body ready to pay the money, he doth pay it himſelf to ſave the forfeiture of the obligation; hereby the condition to ſave harmleſs is broken, and the obligation forfeit. And therefore much more if the obligee be ſued, arreſted, outlawed, or taken in execution for the debt of the principal: ſo alſo if the obligee be put in fear of arreſt for the debt of the principal, and therefore dare not go about his buſineſs; by this the condition is broken. But if the obligee be ſued unjuſtly, either becauſe he is ſued before the money is due, or otherwiſe; or if the bond, in which he is bound, be againſt law and void; and he ſuffer himſelf to be unjuſtly vexed thereupon and doth not take advantage of it; it ſeems this is no breach of the condition of the bond to ſave harmleſs. Dier 186. 187. 18 Ed. 4. 27. 28. Co. 5. 24. Old Book of Entry 12.

If a bailiff diſtrain beaſts on a *withernam*, and afterwards redeliver them to the party of whom he had them, and take a bond from him with condition to ſave him harmleſs from him for whom the beaſts were taken, and after he doth bring a detinue againſt the bailiff for the beaſts; in this caſe, the condition is not broken; for this action will not lie in this caſe. 2 H. 4. 9.

To pay money.

If the condition be to pay money to me at a day and place certain, and the money is not tendered at the time and place; albeit there be no body ready to receive it, if it be tendered, yet the condition is broken. Kelw. 60.

If the condition be to pay money to me at a day and place, and the obligor in his going to the place is robbed of the money ſo as he cannot pay him; in this caſe, notwithſtanding, the condition is broken, and the obligation forfeit, and this will not excuſe it. Bro. Oblig. 9.

* P. 391.

* If the condition be to pay money to me at a day and place, and I, ſeeing him going to the place to pay the money, do wiſh him to forbear, and thereupon he doth ſo, and doth not pay it; in this caſe, the obligation is forfeit, and this will not excuſe. But if I do violently and actually detain and hinder him, ſo that he cannot pay it, this will excuſe him. Kelw. 60.

To pay rent.

If the condition be to pay me the rent reſerved on ſuch a leaſe, at the times limited by the leaſe, and it be not accordingly; hereby the condition is broken, albeit I do never demand the rent. Hil. 4 Jac. Molineux caſe.

If the condition be to pay me the rent reſerved on ſuch a leaſe, and I enter upon all or part of the land demiſed, ſo as the rent is ſuſpended ſo long as I keep the poſſeſſion; in this caſe, the non-payment of the rent during the time of the ſuſpenſion of the rent, is no breach of the condition. Bro. Obl.

For quiet enjoying.

If the condition be that I ſhall enjoy land without the interruption of any perſon whatſoever, and afterwards I do forfeit it myſelf by non-payment of rent, or the like; this is no breach of the condition. Dier 30.

If the condition be, that the obligor ſhall ſuffer the obligee to enjoy lands, *&c.* and that without the let of him, *&c.* or any other perſon or perſons, *&c.* and one that hath an elder title doth enter; this is no breach of the condition. But if he procure this entry and diſturbance, this is a breach of the condition. Dier 255. 17 Ed. 4. 3.

Kelw. 60. If the condition be, that *B.* and others ſhall quietly enjoy land, and *A.* the obligor and *B.* the obligee doth diſturb the others; it ſeems by this diſturbance the condition is broken.

Co. 9. 51. If the condition be, that the obligor ſhall not diſturb me in the keeping of my courts, and he keep the courts and take the fees himſelf; this is a breach of the condition.

Co. ſuper Lit. 384. If one make a feoffment of land to me, and make me an obligation with condition to defend the land for twelve years, *&c.* and I am entered on by a ſtranger, but never impleaded; in this caſe, the condition is broken.

Co. 4. 61. 8. 83. If the condition be, to ſtand to the award of *I. S.* and the obligor doth afterward countermand the ſubmiſſion made to *I. S.* this is a breach of the condition. *Factum non dicitur quod non perſeverat.* To ſtand to an award.

Co. 8. 82. 83. 18 Ed. 4. 20. If the condition be, that I ſhall have licence to carry wood ſeven years, and the obligor doth give me a licence for ſeven years, and then doth revoke it again; this is a breach of the condition. To give a licence.

18 Ed. 4. 23. If the condition be, that *I. S.* ſhall give me licence to go over his ground, and *I. S.* doth ſo, but another doth interrupt me; this is no breach of the condition. And yet if the condition be, that I ſhall have licence to go over that ground, there perhaps ſuch an interruption * may be a breach of the condition. * P. 392.

Fits. Barre 60. If an obligation be made to me with condition, to appear in ſuch a court ſuch a day, and at the day he is kept in priſon at my ſuit ſo as he cannot appear; in this caſe, his non-appearance is no breach of the condition, for his impriſonment ſhall excuſe him. But if his impriſonment be for felony, or any other ſuch like cauſe of his own, *contra.* To appear.

Dier 25. If the condition be, to appear in ſuch a court ſuch a day, and before the day a *Superſedeas* doth come to the ſheriff; yet, if the obligor do not appear, the obligation is forfeit.

Perk. Sect. If the condition be, that the obligor ſhall ride with *I. S.* to *Dover* ſuch a day, and *I. S.* doth not go thither that day; in this caſe, it ſeems, the condition is broken, and that he muſt procure *I. S.* to go thither and ride with him at his peril. To ride to Dover.

Per Juſt. Nichols M. 13. Ja. If I make a leaſe for years, and the leſſee doth enter into an obligation with condition that he ſhall not alien the land demiſed without my licence, and I die, and then he doth alien it; it ſeems this is a breach of the condition. Not to alien.

Perk. Sect. 772. 6 Ed. 4. 2. If the condition be, that *I. S.* ſhall ſerve me in all my honeſt and lawful commands; or that *I. S.* ſhall be a good and honeſt ſervant to me one year; in the firſt caſe, if I command him nothing, the condition is not broken, albeit he never tender his ſervice; but in the laſt caſe, it ſeems he is to tender his ſervice to me, or otherwiſe the condition will be broken. But if I refuſe his ſervice when it is tendred, or he die within the time, the obligation is diſcharged. And yet if he depart away within the time, the condition is broken. To ſerve.

4 H. 7. 4. Perk. 799. If the condition be, that *A.* ſhall marry *B.* by a day, and before the day the obligor himſelf doth marry her: in this caſe the condition is broken. But if the obligee marry her before the day, the obligation is diſcharged. To marry a woman.

Briſcoe's caſe Trin. 9. Ja. B. R. If the condition be, to perform the covenants and payments of a deed, and the deed doth contain a feoffment, and this is on condition that if the feoffor pay ſuch a ſum of money he ſhall re-enter, and he doth not pay it; in this caſe, this non- To perform covenants.

payment is no breach of the condition. But if *A.* let land by indenture to *B.* for years rendring rent, and *B.* doth bind himself in an obligation with condition to perform all the covenants contained in the indenture, and the rent is unpaid; this is a breach of the condition, and cauſe of forfeiture of the obligation. Adjudged Griffin & Scotts caſe 3. Jac. B. R.

To keep priſoners. If the condition be for the ſafe keeping of priſoners, and one doth eſcape that is in execution, and in priſon under colour of an execution, or the like, but in truth and in judgment of law is no priſoner; this eſcape is no breach of the condition. See more in *Condition*, at *numb.* 10. Curia Trin. 37 Eliz.

* P. 393.

11. By what means and when an obligation, good in its original creation, doth or may become void, be diſcharged or gone, by matter *ex poſt facto:* or not.

* If the condition of an obligation conſiſt of two parts in the disjunctive, or be to do one of two things before, or at a day certain, and both the things are poſſible at the time of the making of the obligation, and before the time of performance one of the things is become impoſſible to be done by the act of God, or by the act of the obligee himſelf; in this caſe, the obligation is diſcharged for ever. And therefore if the condition be, that if the obligor ſhall ſell away his wife's land, if then he ſhall either in his life-time purchaſe to his wife and her heirs and aſſigns, land of as good right and value, as the money by him received or had by or upon the ſaid ſale ſhall amount unto, or elſe do and ſhall leave unto her by legacy, or otherwiſe, as much money as ſhall be by him received upon ſuch ſale, that then, *&c.* and the obligor doth ſell his wife's land, and then his wife doth die before him, ſo that he cannot leave her the money; in this caſe, the obligation is diſcharged, and the huſband is not bound to purchaſe land to her and her heirs. So if the condition be, that if *I. S.* do not prove the ſuggeſtion of a bill depending in the court of requeſts before the utas of Hilary, that then he ſhall pay 20*l.* *&c.* and *I. S.* die before the utas; hereby the obligation is diſcharged for ever, and he is not bound to pay the 20*l.* So if the condition be, that if the obligor appear in the King's-Bench in Eaſter term, or pay 20*l.* to the obligee at Michaelmas, and the obligor die before Eaſter term; hereby the obligation is diſcharged; but if he do not appear in Eaſter term and outlive the term, and die after; then it ſeems the 20*l.* muſt be paid at Michaelmas, or the obligation is forfeit. So if the condition be, that the obligor ſhall marry *A.* before Eaſter, or pay 20*l.* to the obligee at Michaelmas, and *A.* die, or become mad before Eaſter, or the obligee marry *A.* himſelf, and the marriage doth continue between them until Eaſter be paſt; in all theſe caſes the obligation is diſcharged for ever. But when the thing is become impoſſible by the act or laches of the obligor, the law is otherwiſe. And therefore if the condition be, that *A.* ſhall marry with *B.* before Eaſter, or that the obligor ſhall pay unto the obligee 20*l.* at Michaelmas, and the obligor himſelf marry with *B.* and the marriage doth continue until after Eaſter; hereby the obligation is not diſcharged. So if the condition be to deliver up an obligation before Eaſter, or give a releaſe at Michaelmas, and the obligor doth looſe the obligation, or the obligation is burnt; hereby the obligation is not diſcharged, for if he doth not make the releaſe at Michaelmas, he doth forfeit the obligation (1). Co. ſuper Lit. 207. Co. 5 22. 15 H. 7. 2. Dyer 262. 15 H. 7. 4. 4 H. 7. 4. Agree 9. Jac. in Bathurſt caſe.

(1) See further how conditions in the disjunctive are to be performed, *Bac. Abr.* Obligations (F. 2.)

3 Ed. 4. 21. Co. 5. 22. Perk. sect. 769. 757. 6. H. 7. 4. 24. Ed. 4. 27.

If the condition of an obligation consist of one part only, or be to do one thing at a time certain, and that thing at the time of the obligation made is possible to be done, but afterwards, and before the * time when it is to be performed, it doth become impossible by the act of God, or the act of the obligee; in this case also, the obligation is gone and discharged for ever. And therefore if the condition be to appear in person such a day in such a court, and before the day the obligor die, or at the day the water doth arise so high that he cannot travel to the place without peril of life; in these cases, the obligation is discharged. So if the condition be, that *A.* shall marry *B.* before Easter, and before the time *A.* or *B.* die, or become mad, or the obligee marry *B.* and the marriage doth continue until after the day; in all these cases, the obligation is discharged. But if the thing become impossible by the act of the obligor, *contra.* And therefore if the condition be, that the obligor shall appear such a day, and before, and at the day, he is imprisoned through some default of his own so that he cannot appear, this will not excuse him, no more than in case where he is so sick that he cannot appear without peril of his life. So if the condition be, that *B.* shall marry *C.* before Easter, and the obligor himself marry her, and the marriage doth continue until after the time; in this case, the obligation is forfeit. So if the condition give the obligor time all his life-time to do the thing, the obligation is not discharged by his death, but in this case he must do it during his life-time at his peril.

* P. 394.

So held in the Exchequer. 3 Cur.

Curiæ Co. B. Hill 37. Eliz.

Adjudged 37. Eliz. Co. B. Greening-ham versus Ewre.

If the condition be, that the obligor shall deliver to the obligee an obligation, or such a release as the counsel of the obligee shall devise, before Michaelmas, and the counsel of the obligee devise no release before Michaelmas; hereby the obligation is gone for ever.

Bro. Oblig. 6. 88. 29. 4. H. 7. 6.

If the obligation depend upon, or be necessary to, some other deed, and that deed become void, in this case the obligation is become void also; as if the condition of the obligation be, to perform the covenants of an indenture, and afterwards the covenants be discharged or become void; by this means the obligation is discharged and gone for ever. And if one make a lease for years, rendring rent, and the lessee enter into an obligation with condition to pay the rent to the lessor, and after it fall out so that the lessee is evicted out of the land by an elder title, whereby the rent in law is gone; in this case, and by this means, the obligation is discharged and gone also. But if the eviction be but of a part of the land, *contra.*

Co. 5. 119.

If an obligation be made to me, and delivered to *I. S.* to my use, and, when it is tendred to me, I do refuse it and disagree to it; hereby it is become void, and cannot afterwards be made good again. So if an obligation be made to my wife, and I disagree to it; hereby it is become void.

Fit. Bar. 37.

By a release made from the obligee to the obligor, or to one * of the obligors if there be more than one, the obligation may be discharged. And therefore, if an obligation be made to me with condition to pay money, and I by my deed release it, or acknowledge myself satisfied for the debt; albeit I receive none of it, or that I receive but part of it in full satisfaction of the debt; by this the obligation is discharged for ever.

* P. 395.

If

If the obligee make the obligor, or one of the obligors, or all the obligors, his executor, or his executors; hereby the obligation is discharged for ever. But the granting of letters of administration to one, or more of the obligors, is no discharge of the obligation. And if the obligor make the obligee his executor, this is no discharge of the obligation. Bro. Oblig. 61 Co. 8. 136. 8. Ed. 4. 3. 21 Ed. 4. 2. 11 H. 7. 4.

If the obligee be a woman, and take the obligor to husband, hereby the obligation is discharged. Bro. Oblig. 61.

If the condition be to enfeoff *K. S.* (a woman) before such a time, and before the day the obligor doth marry the woman; this doth not discharge the obligation. Fitz. Barre 133.

If the condition be to serve me seven years, and within the time I licence him to depart, it seems that hereby the obligation is discharged: and yet if the condition be to stand to an award, and it is awarded that one of the parties shall pay 5*l.* a year for seven years towards the education of *I. S.* and *I. S.* die within the seven years, the obligation is not discharged by his death, but the money must be paid during the time notwithstanding. Dier 329.

If the condition be to do two things, or stand upon divers points; and the obligee, supposing the breach of one of them, doth sue the obligor, and the issue being joined upon that point it is found against the plaintiff, and he is barred; hereby the whole obligation is discharged; and, so long as that judgment is in force, he can never sue the obligation upon any other point within the condition. Dier 372.

If the condition be to satisfy me for goods I have delivered to *I. S.* if they be lost, and afterwards they be lost, and I sue *I. S.* and have him in execution for them; by this the obligation is not discharged: but perhaps when I have satisfaction of *I. S.* being in execution for the goods, the obligation may be gone. Fitz. Barre 640.

And in all cases by which a deed in general may become void by matter *ex post facto*, as by rasure or the like, an obligation may become void.

CHAP. XXII.

CHAP. XXII.

Of a Defeaſance.

*THIS in a large ſenſe doth ſometimes ſignify a condition annexed to an eſtate; and ſometimes the condition of an obligation made with, and annexed to, the obligation at the time of making thereof: but it is more peculiarly and properly applied to ſuch conditional inſtruments, as are made in defeaſance and avoidance of ſtatutes and recognizances, at the time of entring into the ſame ſtatutes or recognizances; and to ſuch conditional inſtruments as are made in defeaſance of ſtatutes, obligations, and the like, after the time of the ſame ſtatutes entered into, and obligations, &c. made: and it is therefore defined as follows.

* P. 396. Defeaſance, *Quid.*

A defeaſance is a condition relating to a deed, as to an obligation, recognizance, ſtatute, or the like, which being performed, by the obligor or recogniſor, the act is diſabled and made void, as if it had never been done; which differeth from a condition only in this, that this is always made at the ſame time, and annexed to, or inſerted in, the ſame deed; but that is always made in a deed by itſelf, and for the moſt part made after the deed whereunto it hath relation (1).

Co. ſuper Lit. 236. 237 1. 111. 113. Plow. 137. 193. 21 H. 7. 23. Bro. Defeaſance in toto.

2. Where and in what caſes a defeaſance may be; and what things may be defeated and avoided thereby; and where, and what not.

There is no inheritance executory, as rents, annuities, conditions, warranties, covenants, and ſuch like, but may by a defeaſance, made with the mutual conſent of all thoſe which were parties to the creation thereof at the ſame, or at any time after, be annulled, diſcharged and defeated. And ſo is the law of ſtatutes, recognizances, obligations, and the like; yet ſo, as in all theſe caſes regularly, the defeaſance muſt be made *eodem modo* as the thing to be defeated was and is created, *viz.* if the one be by deed, the other muſt be ſo alſo: for it is a rule, that in all caſes, where any executory thing is created by a deed, that the ſame thing, by the conſent of all perſons who were parties to the creation of it, may be by their deed defeated and annulled; and therefore that warranties, recognizances, rents, charges, annuities, covenants, leaſes for years, uſes at common law, and ſuch like, may, by a defeaſance made with mutual conſent of all thoſe that were parties to the creation of it by deed, be diſcharged and avoided. *Nil eſt tam conveniens naturali æquitati quam quod unumquodque diſſolvi poteſt eo ligamine quo ligatur.* And therefore by ſuch a defeaſance, not only the covenant which doth create a power of revocation, but the power itſelf created, may be utterly defeated and avoided: but eſtates of inheritance, and other eſtates in tail or for life, executed by livery, &c. cannot be avoided by defeaſance made after the time of their

(1) A defeaſance is a collateral deed, made at the ſame time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the eſtate then created may be defeated or totally undone. 2 *Bl. Com.* 327. — —A defeaſance on bond, or recognizance, or judgment recovered, is a condition, which, when performed, defeats or undoes it: it differs only from the common condition of a bond, in that the one is always inſerted in the deed or bond itſelf, the other is made between the ſame parties by a ſeparate, and frequently a ſubſequent deed. *ibid.* 342.—See further as to the nature of defeaſance, and what ſhall be ſaid to amount to one, in *Com. Dig.* Defeaſance (A.)—*Wood's* Inſt. 293.—*Vin. Abr.* Defeaſance (F).

creation and firſt making. And yet by * another deed of defeaſance made at the time, a feoffment, releaſe, leaſe for life, or other executed thing, may be avoided, as well as if it were by condition within the ſame deed: as if a diſſeiſee releaſe to the diſſeiſor, this releaſe cannot be defeated by an indenture of defeaſance made afterwards; but it may be defeated by an indenture of defeaſance made at the ſame time. *Quæ in continenti fiunt in eſſe videntur* (1).

* P. 397.

3. What ſhall be ſaid a good defeaſance; and what not.

To make a defeaſance, theſe things are requiſite: 1. That the defeaſance be made *eodem modo*, as the thing to be defeated is created: for if the obligee by word only diſcharge the obligor, or grant not to ſue him; this will not defeat the obligation; it muſt be by deed therefore, as the former was. [a] But whether the deed or defeaſance be indented or poll is not material: 2. [b] That if it do recite the ſtatute or the obligation, (as for the moſt part it doth,) that it be done truly: for if a defeaſance be made of a ſtatute or an obligation, which is recited to be made the tenth day of *May*, whereas in truth it beareth date the firſt day of *May*, this defeaſance is void. 3. [c] That it be made between the ſame perſons that were parties to the firſt deed, *&c.* and therefore, if *A.* be bound in an obligation to *B.* in 20*l.* and *B.* make a defeaſance to *C.* that if *C.* pay him 20*l.* the obligation made by *A.* ſhall be void; this is no good defeaſance, becauſe it is not made between the ſame parties. [d] And yet if a ſtatute be made to the huſband and wife, and the huſband alone join in the making of a defeaſance, this is a good defeaſance. 4. [e] That it be made after the making of the recognizance, obligation, *&c.* and not before: for if *A.* grant to *B.* that if *B.* will be bound to him in 20*l.* by obligation, that the obligation ſhall be void; and after *B.* doth bind himſelf to *A.* in an obligation of 20*l.* that defeaſance is not good becauſe it is before the obligation. [f] And yet if the date of the defeaſance be before the date of the recognizance, *&c.* and it be delivered after, it is good enough. 5. That it be made of a thing defeaſible: [g] for if a diſſeiſee releaſe his right to the terre-tenant, and after there is a defeaſance made between them, that, if the releaſor ſhall pay 20*l.* to the releaſee, the releaſe ſhall be void; this is a void defeaſance. [h] And yet a releaſe may be avoided by a condition or defeaſance made at the time of making of a releaſe as well as a feoffment.

For the manner of it.

For the matter of it.

Co. 1. 113.

a] Bro. Defeaſ. 12 Fitz. Barre 95.

b] Plow. 393.

c] 14 H. 8. 10. Bro. Eſtrang 1 fait. 10.

d] Bro. tit. Defeaſance 3.

e] Bro. Defeaſance 5.

f] Dier 315.

g] Plow. 137 Bro. Defeaſance, 1.

h] Bro. Defeaſance, 6. 9. Co. ſuper Lit. 236. See Weſt. Symb Bro. Defeaſance in toto.

If the defeaſance of a recognizance, obligation, *&c.* be, that if the cogniſor, or obligor, *&c.* pay a ſum of money, or do not diſturb the execution of the will of *I. S.* or do make a leaſe for years to *I. S.* or the like; theſe are good defeaſances. As if the grantee of a rent-charge grant to his grantor, that if he ſhall pay him 20*l.* ſuch a day, the grant of the rent ſhall be void. Albeit the condition of an obligation, that is repugnant to the obligation itſelf, is void, and the obligation ſingle; yet it is otherwiſe in caſe of a defeaſance * made after the obligation; for this is good, notwithſtanding it be repugnant. And therefore if the obligee, after the obligation made, grant by deed to the obligor, that the obligation ſhall be void; or that he will not ſue the obligation at all; or that he will not ſue the obligation until ſuch a time; or that

20 H. 7. 24. 21 H. 7. 32. Fitz. Barre. 71.

* P. 398.

(1) See accordingly, and further in 1 *Wood* 786.—*Com. Dig.* Defeaſance (B.)—*Vin. Abr.* Defeaſance (C).

the

the obligation ſhall be diſcharged; theſe defeaſances are good to avoid the obligation.

Bro. Defea. 4. 7 H. 6. 43. 21 H. 7. 23. Perk. ſect. 69.

If the feoffee with warranty grant, that neither he nor his heirs ſhall take benefit of the warranty of the feoffor or his heirs; this is a good defeaſance of the warranty: and if he grant, not to vouch, this will diſcharge the voucher: and if he grant not to bring a *warrantia chartæ*, this will bar him of that remedy. In like manner it is, if the grantee of a rent-charge grant to the grantor, that he will not take any benefit by the grant, this is a total diſcharge; and if he grant, that he will not bring an annuity, this is a diſcharge of the perſon; and if he grant, that he will not diſtrain the land for the rent, this is a diſcharge of the land.

Bro. Defeaſance 11. Condition, 120.

If one make a leaſe for life by deed, and after by another deed doth grant to his leſſee, that he ſhall not be impeached for waſte; this is a good diſcharge: and if the leſſee afterwards grant by deed to the leſſor, that if he ſhall bring an action of waſte againſt the leſſee, that he will not make uſe, nor take advantage of the deed of diſcharge; this is a good defeaſance of the diſcharge. So that hereby it ſeems a defeaſance may be of a defeaſance, and one defeaſance after another, and regularly the laſt ſhall ſtand. And therefore, if a leaſe for years be made on condition to pay 20 *l.* at Eaſter, and the leaſe to be void, and before Eaſter the leſſor and leſſee agree, that, if the leſſor pay it at Eaſter following, the leaſe ſhall be void, and before that time they make the like agreement for another year; it ſeems theſe be good defeaſances, and that the laſt ſhall ſtand.

Agreed Paſche. 8. & Ja. Co. B.

Per Juſt. Bridgman.

Bro. Defeaſance 7.

If the defeaſance after execution made upon a ſtatute be thus, that, if the conuſor pay ſo much money, the ſtatute ſhall be void; it ſeems by this the ſtatute and execution thereupon is void; howbeit, it is beſt to add theſe words in the defeaſance [and the execution thereupon.] (1).

And now being coming towards an end, we come to the laſt aſſurance of a man's life, or that kind of aſſurance that men do commonly make when they are near and towards the end of their life, *viz.* a Teſtament.

(1) See further in *Vin. Abr.* Defeaſance (D).

CHAP. XXIII.

CHAP. XXIII.

Of a Teſtament.

* P. 399.
1. Teſtament, *Quid.*

* A Teſtament is the full and compleat declaration of a man's mind or laſt will of that he would have to be done after his death: It is in Latin *Teſtamentum*, i. e. *Teſtatio mentis*, the witneſs of a man's mind; and to deviſe by teſtament, is to ſpeak by a man's will what his mind is, to have done after his death: and this is ſometimes called a will or laſt will; for theſe words are *Synonima*, and are as it ſeems promiſcuſly uſed in our law: howſoever, by the civil law it is then only ſaid to be a teſtament, when there is an executor made and named in it; and when there is none, but a codicil only; for a codicil is the ſame that a teſtament is, but that it is without an executor; and a man can make but one teſtament that ſhall take effect, but he may make as many codicils as he will. And by the common law where lands or tenements are deviſed in writing, albeit there be no executor named, yet there it is properly called a laſt will, and where it doth concern chattles only, a teſtament (1). He that doth make the teſtament is called the teſtator: and when a man dieth without will, he is ſaid to die inteſtate.

Terms of the Law. Lit. Bro. Sect. 300. Co. ſuper Lit. 111. Swinb. of Wills 24.

Codicil, *Quid.*

Teſtator.
Inteſtate.

Quotuplex.
Written.

Of teſtaments there be two ſorts, namely, a teſtament in writing, or a written teſtament; which is, where the mind of the teſtator in his life-time, by himſelf or ſome other by his appointment, is put in writing: and a teſtament by word, or without writing, which is, where a man is ſick, and for fear leſt death or want of memory or ſpeech ſhould ſurpriſe him, that he ſhould be prevented if he ſtayed the writing of his teſtament, deſireth his neighbours and friends to bear witneſs of his laſt will, and then declareth the ſame preſently by word before them: and this is called a *Nuncupative*, or a *Nuncupatory* teſtament: and this being after his death proved by witneſſes, and put in writing by the ordinary, is of as great force for any other thing but land, as when at the firſt in the life of the teſtator it is put in writing. A codicil alſo is in writing, or by word, as a teſtament is: the civilians have other diviſions of wills and teſtaments, as ſolemn and unſolemn, privileged or unprivileged, whereof the common law maketh no mention.

Perk. ſect. 476. Co. ſuper Lit. 111.

Nuncupative.

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(1) See further as to what may be deemed a will or a teſtament, and the difference between them, in *Swinb.* 6th edit. *p.* 1.—*Bac. Abr. Tit.* Wills and Teſtaments (A.)—4 *Burn's* Eccl. Law, 41.—3d. edit. —— With reſpect to the introduction and progreſs of Wills in *England*, it may not be improper to ſelect a paſſage from *Wright's* excellent treatiſe on *Ten.* 173. where it is ſaid, It was altogether as much againſt the nature of a feud, that the feudatary ſhould diſpoſe of it by *will*, as that he ſhould otherwiſe alien it: upon this ground it was, that though lands were deviſeable until the conqueſt, or rather until the eſtabliſhment of *tenure*; yet then, or ſoon after, the power of diſpoſing by *Will* generally vaniſhed, except of *ſocage* lands and tenements in ſome *cities* and *burroughs*, where it was retained, or rather indulged; it being of little conſequence into what hands ſuch *tenures* fell. And thus far it is true, that *Nullum teſtamentum apud nos manſit pro lege*, until the ſtatutes 32 and 34 *Hen.* 8. gave a teſtamentary power over lands, ſubject only to the reſtrictions and conditions of thoſe ſtatutes. But though lands were not, as is ſuggeſted, deviſable from the time of the *conqueſt* until the time of *Henry* 8. yet upon a diſtinction ſtarted, ſoon after the ſtatute *Quia emptores terrarum*, between the *land* and the *uſe* or profits of the land, *feoffments* to *uſes* were invented; by means whereof a man might, before the ſtatute 27 *H.* 8. *c.* 10. by will diſpoſe of the profits, though he could not diſpoſe of the *land* itſelf.— —See more amply as to the antiquity of teſtaments, and their introduction and progreſs in *England*.—2 *Bl. Com.* chap. 22. and chap. 33.—*Sull.* Lect. 151. 2d edit.—*God. Orp. Leg. p.* 1.

Terms of the Law, tit. Deviſe, &c. ſuper Lit. 111. Swinb. lib. 1. c. 7.

The parts of every compleat teſtament whereof it doth conſiſt, are two: 1. The making of deviſes, or giving of legacies: 2. The making and ordination of an executor; for a teſtament can be no more without, than a codicil can be with, an executor. 2. The parts of it.

* A deviſe, or legacy, is where a man in his teſtament doth give any thing to another; the firſt of theſe terms is properly applied to the gift of lands, and the laſt to the gift of goods or chattles: and therefore a deviſe ſtrictly is ſaid to be where a man in his teſtament doth give his lands to another after his deceaſe; and a legacy is ſaid to be where a man in his teſtament doth give any chattel to another to have after the death of the teſtator; but the word is promiſcuouſly applied to the one and to the other. And he that gives by ſuch a will, is called the deviſor, and he to whom the thing is given, the deviſee or legatee. * P. 400. Deviſe or legacy. *Quid.* Deviſor, deviſee, or legatee.

Dier 317. 74. Co. ſuper Lit. 217. Swin. 132. 134. 136.

And a deviſe is ſometimes ſimple and without condition: as where I give my land to another and his heirs, or I give 20 *l.* to another, without more words. And ſometimes it is with a condition: which is, when there is a quality added to the deviſe or legacy, whereby the effect of it is ſuſpended or hindred, and it is thereby made to depend on ſome future event. And this condition, in this caſe, may be made almoſt by any words; as if I give to one my land, if he pay 20 *l.* to my daughter; or ſo as he pay 20 *l.* to my daughter; or paying 20 *l.* to my daughter; or I give one 20 *l.* if he marry my daughter; or when he ſhall marry my daughter; or I give my wife 20 *l.* a year, whilſt ſhe ſhall live unmarried; or I give to him, whoſoever ſhall marry my daughter 20 *l.* or the like; in all theſe caſes the deviſe is conditional. The firſt kind of deviſe is called by the Civilians a ſimple aſſignation, and the latter a conditional aſſignation. *Quotuplex.* Conditional deviſe.

New Terms of the law. Co. 8. 135. Plow. 288. Co. ſuper Lit. 209. Co. 9. 40.

An executor in a large ſenſe is taken for any one that is appointed to have the diſpoſition and ordering of the goods and chattles of a man that is dead. And ſo there are three kinds of executors: the firſt is *a lege conſtitutus*, who is therefore called *legitimus*; and ſuch a one is the ordinary of the dioceſs, who hath ordinary juriſdiction in matters eccleſiaſtical: the ſecond is *à teſtatore conſtitutus*, who is therefore called *teſtamentarius*; and he is ſtrictly and properly called an executor; and is defined to be one appointed by a man's laſt will and teſtament to have the diſpoſing and adminiſtration of all or part of a man's goods and chattels, and to perform a man's laſt will and teſtament, according to the contents thereof: the third is *ab epiſcopo conſtitutus*, who is therefore ſaid to be *dativus*: and ſuch a one is an adminiſtrator, who is defined to be one that hath the goods and chattles of a man dying inteſtate, committed to his charge by the ordinary for want of an executor: and his power, benefit, and charge is in all things equal to the power, benefit, and charge of an executor. Executor. *Quid.* Ordinary. Adminiſtrator.

Dier 4. Bro. Executor 155. Co. 6. 19.

The executor and adminiſtrator alſo is ſometimes univerſal or total, *i. e.* one that hath the power and diſpoſition of the whole perſonal eſtate committed to him. And ſometimes he is particular * or partial, *i. e.* one that hath the power and diſpoſition of ſome part of the eſtate, or of all the eſtate for a time only, committed to him. And ſometimes he is abſolute, *i. e.* ſuch a one that hath an abſolute power of the eſtate, as executor, or adminiſtrator: and ſometimes he is conditional, *i. e.* one that hath a limited and conditional power of the eſtate only. And in both caſes he ſhall be charged and chargeable for ſo much as is committed *Quotuplex.* * P. 401.

Co. ſuper Lit. 209. St. 31 Ed. 3. c. 11 Co. 9. 40. 8. 135.

Repreſent the perſon of the teſtator.

committed to him as the teſtator or inteſtate himſelf: for this cauſe the executor is ſaid to repreſent the perſon of the teſtator; for as to the eſtate committed to his truſt he may charge others, and be charged himſelf, ſue and be ſued, as the teſtator himſelf might. And the eſtate he hath by his executorſhip is ſaid to be in him to the uſe of the teſtator and in his right: and that he doth in the diſpoſition of his eſtate is ſaid to be in the right and to the uſe of the teſtator alſo. And the adminiſtrator hath the ſame power and property over and in the goods and chattles, the ſame remedy by ſuit, and ſo far forth ſhall be charged, as the executor; for they differ not in nature, but in name only. And yet the adminiſtrator is but the ordinary's deputy; and he may revoke the adminiſtration, or call the adminiſtrator to an account (1).

3. The nature and effect of a teſtament, and of a codicil.

A teſtament is of that nature, that it doth much differ from other acts and deeds, that men do and execute in their life-times: for albeit it be made, ſealed, and publiſhed in ever ſo ſolemn a manner, yet it hath no life nor virtue in it until the teſtator's death; for it is a maxim in law, *omne teſtamentum morte conſummatum eſt; et voluntas eſt ambulatoria uſque ad extremum vitæ exitum*: it is therefore reſembled until death to the interlocutory ſentence, and after death to the definitive ſentence, of a Judge. And hence it is ſaid, *Sed legum ſervanda fides* [b] *ſuprema voluntas, quod mandat, fierique jubet, parere neceſſe eſt.* And for this cauſe a man may alter, or make void his will at his pleaſure; and he may make as many new wills and teſtaments as he will; and there are no means under the ſun to bar a man of this liberty. And the latter teſtament doth always revoke and overthrow the former; but otherwiſe it is of a codicil (2); [a] for a man may make as many of theſe as he will, and make no teſtament at all; [b] or if he make a teſtament he may afterwards make as many codicils as he will, and one of them will not overthrow the other; for in the firſt caſe they muſt be all annexed to the letters of adminiſtration, and the adminiſtrator muſt perform them; and in the latter caſe they muſt be all annexed to the teſtament, and the executor muſt take care to perform them. A teſtament therefore is ſaid to have three degrees. 1. An inception, which is the making of it. 2. A progreſſion, which is the publication of it. 3. A conſummation, which is the death of the teſtator. In grants therefore, the firſt is of greateſt force, but * in teſtaments the laſt is of greateſt force. But when a teſtament is perfect by the death of the party, it doth as effectually give and transfer eſtates, and alter the property of lands and goods, as acts executed by deeds in the life-time of the parties: for hereby deſcents of lands are prevented; and a man may make eſtates in fee-ſimple, fee-tail, for life, or years, of lands, tenements, rents, reverſions or ſervices, as effectually by teſtament, as by deed; and

Swinb. 12. Dier 143. Co. ſuper Lit. 112. Lit. ſect. 168. Co. 4. 61.

Lit. Bro. Sect. 300.

Lit. ſect. 168. Perk. Sect. 478.

a Swin. 13. 14. b Bro. Teſtament 20.

Plow. 343, 344.

Co. ſuper Lit. 112.

* P. 402.

Lit. ſect. 167, 168.

(1) See more amply as to the different kinds of executors in *Swinb.* 379.—6th edit.—and in *Godf. Orp. Leg.* 75.—

(2) Which is either for the explanation or alteration of ſomething in, or for addition of ſomething to, or for ſubſtraction of ſomething from, the teſtament: and a codicil hath this further uſe and force in law, that wherever it is added to a teſtament, wherein the teſtator declares that he will have the diſpoſal of his eſtate to be in force, either by way of a teſtament, or codicil, or whatever other way the law allows; in that caſe, if the teſtament to which ſuch codicil is annexed, afterwards proves to be invalid as a teſtament, that is, as to the appointing or conſtituting of an executor, yet it ſhall ſtand good as a codicil; and be obſerved as ſuch by him who adminiſters to the ſame. *God. Orp. Leg.* 4.

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theſe eſtates alſo will be good without any livery of ſeiſin or attornment. And hereby alſo rents, and power to diſtrain for them, may be transferred: conditions created and annexed to eſtates, or to things deviſed. And therefore they that take by deviſes of lands, are ſaid to take in the nature of purchaſers. And if therefore a tenant in tail make a feoffment to the uſe of himſelf in fee, and after deviſe the ſame land to his wife in fee, and die; the ſon is not remitted, though the father die ſeiſed: for the deviſe doth prevent the deſcent (1).

Perk. ſect. 505

Dier 221.

To the making of every good teſtament, theſe things are requiſite.

Co. 6. 23.

1. That the teſtator be a perſon able to make a teſtament, and not diſabled for any ſpecial cauſe, either in reſpect of his perſon, mind, or condition, or in reſpect of the thing whereof the teſtament is to be made. And for this it muſt be known: that a woman that hath a huſband cannot make a teſtament of her lands or goods, except it be in ſome ſpecial caſes (2): for of her lands ſhe can make no teſtament, either with or without her huſband's conſent: of the goods and chattels ſhe hath as executrix, to any other, ſhe may make an executor without her huſband's conſent; for if ſhe do not ſo, the adminiſtration of them muſt be granted to the next of kin to the deceaſed teſtator, and ſhall not go to the huſband: but of them ſhe can make no deviſe, either with or without her huſband's leave, for they are not deviſable; and if ſhe do deviſe them, the deviſe is void (3). And of the things due to the wife, whereof ſhe was not poſſeſſed during the marriage, as things in action (4), and the like, it ſeems ſhe may make her teſtament; at leaſt ſhe may make her huſband executor of her paraphernalia, *viz.* her neceſſary wearing apparel, being that which is fit for one of her rank: ſome ſay ſhe may make a teſtament without her husband's leave; others doubt of this; howbeit all agree, that ſhe and not his executor, ſhall have this after her husband's death, and that the husband cannot give it away from her (5). And of the goods and chattels her husband hath, either by her or otherwiſe, ſhe may not make a teſtament, without the licenſe and conſent of her husband firſt had ſo to do. But with his leave and conſent ſhe may make a teſtament of his goods, and make him her executor if ſhe will. And it is ſaid alſo, that if ſhe do make a teſtament of his goods, (in truth, without his leave and conſent,) and he after her death * ſuffer the will to be proved, and deliver the goods accordingly; in this caſe the teſtament is good. And yet if the huſband give his wife leave to make a teſtament of his goods, and ſhe do ſo, he may revoke the ſame

Stat. 32 & 34 H. 8. 5. Co. 4. 51. Bro. Teſtament 13. 12 H. 7. 14. Perk. ſect. 502. Fitz. Execut. 40.

Plow. 526. Fitz. Executor 109.

12 H. 7. 24. 18 Ed. 4. 11. Perk. ſect. 501. Fitz. Executor 5. 28. 109. Bro. Teſtament 11.

4. What ſhall be ſaid a good and a ſufficient teſtament, or not.
First, in reſpect of the perſon that doth make it, and the thing whereof it is made: and what perſons may make a teſtament; and of what things; or not; and how.
A feme covert.

* P. 403.

(1) See further as to the nature and effect of a will and codicil, in *Bac. Abr.* Wills. (E.)—*Swinb.* 51.

(2) A wife, whoſe husband is baniſhed by act of parliament for life, may make a will, and act in every other reſpect as a feme ſole, 2 *Vern.* 104. Counteſs of *Portland* v. *Prodgers.*

(3) But although the wife, being executrix, may without her huſband's licenſe make her teſtament of ſuch goods whereof ſhe is poſſeſſed as executrix, yet the profits ariſing therefrom during the marriage ſhall accrue to her huſband, and not unto herſelf as executrix; ſo that without her huſband's approbation ſhe can make no teſtament of ſuch profits.—*God. Orp. Leg. p.* 31.

(4) In the caſe of *Adams* v. *Cole.*—*Ca. Temp. Talb.* 168. Ld. *Talbot* decreed a bond which the husband had in right of his wife, but whereon he had never recovered, to go to the husband's repreſentative; the huſband being a purchaſer of his wife's fortune by the ſettlement he had made upon her.

(5) If a woman ſaves money out of her pin-money or ſeparate maintenance, ſhe may diſpoſe of ſuch money, or of any jewels, *&c.* bought with it, by writing in nature of a will, if ſhe dies before her huſband; and ſhall have it herſelf if ſhe ſurvives him; and ſuch money, jewels, *&c.* ſhall not be liable to her husband's debts. See *Herbert* v. *Herbert*, *Prec.* in *Chan.* 44.

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at any time in her life-time, or after her death before the will be proved. But a woman, after contract with any man, may before the marriage make a teſtament as well as any other, and is not at all diſabled hereby (1).

An infant. An infant, until he be of the age of one-and-twenty years, can make no teſtament of his lands by ſtatutes of 32 & 34 *H.* 8. But by ſpecial cuſtom in ſome places, where land is deviſable by cuſtom, he may deviſe it ſooner. And of his goods and chattels, if he be a boy, he may make a teſtament at fourteen years of age, and not before; and if a maid, at twelve years of age, and not before; and then they may do it without and againſt the conſent of their tutor, father, or guardian. And yet ſome ſay an infant cannot make a teſtament of his goods and chattles until he be eighteen years of age (2).

Sta. 32 Ed. 34 H. 8. c. 5. Perk. ſect. 503, 504. Br. Cuſtom 50. Swin. 37, 38. Co. ſuper Lit. 89.

A lunatic perſon. A mad or lunatic perſon, during the time of his inſanity of mind, cannot make a teſtament of lands or goods; but ſuch a one as hath his *lucida intervalla*, clear or calm intermiſſions, may during the time of ſuch quietneſs and freedom of mind make his teſtament, and it will be good.

Perk. ſect. 503, 504. 24. Swin. 37. 40.

An idiot. So alſo an idiot, *i. e.* ſuch a one as cannot number twenty, or tell what age he is, or the like, cannot make a teſtament, or diſpoſe of his lands or goods; and albeit he do make a wiſe, reaſonable, and ſenſible teſtament, yet is the teſtament void. But ſuch a one as is of a mean underſtanding only, that hath *groſſum caput*, and is of the middle ſort between a wiſe man and a fool, is not prohibited to make a teſtament.

Swinb. 39. 40.

An old man. So alſo an old man, that by reaſon of his great age is childiſh again, or ſo forgetful, that he doth forget his own name, cannot make a teſtament; for a teſtament made by ſuch a one is void. So alſo it ſeems a drunken man, that is ſo exceſſively drunk, that he is deprived of the uſe of reaſon and underſtanding during that time, may not make a teſtament; for it is requiſite, when the teſtator doth make his will, that he be of ſound and perfect memory, [a] *i. e.* that he have a reaſonable memory and underſtanding to diſpoſe of his eſtate with reaſon.

Swinb. 41.

A deaf and dumb man. [b] A man that is both deaf and dumb, and that is ſo by nature, cannot make a teſtament. But a man that is ſo by accident, may by writing or ſigns make a teſtament. And ſo may a man that is deaf or dumb by nature or accident. And ſo alſo may a man that is blind.

a Co. 6. 23. Hil. 3 Car. per the Ld. Keeper in Chancery. b Swin. 53.

An alien. An alien born cannot make a teſtament of lands or goods.

A traitor. [c] A man that is entred into religion, cannot make a teſtament. [d] A traitor attainted, from the time of the treaſon committed, can make no teſtament of his lands or goods; for they are all forfeit to the King; but after the time he hath a pardon from the King for his offence, * he may take a teſtament of his lands or goods as another man.

c Curia B. R. 7 Jac. d Sta. 5 & 6 Ed. 6. c. 11. Swinb. 54.

* P. 404.

A felon. A man that is attainted or convict of felony cannot make a teſtament of his lands or goods, for they are forfeit; but if a man be only indicted, and die before attainder, his teſtament is good for his lands and goods both. And if he be indicted, and will not anſwer upon his arraignment, but ſtandeth mute, *&c.* in this caſe, his lands

Prerogat. Reg. Plow. 258. 259.

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(1) See accordingly, and further as to a teſtament made by a feme-covert, of what things it may be made, and in what caſes it ſhall operate, in *Swinb.* 88.—1 *Wood* 790.—*God. Orp. Leg.* 29.—*Com. Dig.* Deviſe (H. 3.)—4 *Burn's Ecc. Law.* 45.

(2) See fully with reſpect to the earlieſt age at which a will may be made of perſonal eſtate, in *note* 6 to *Co. Lit.* 89. b. 13th edit. where the various authorities, relating to that diſputed point of doctrine, are collected and judiciouſly conſidered.—and further in *Com. Dig.* Deviſe (H. 2.)

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are not forfeit, and therefore it ſeems he may make a teſtament of them (1). And if a man kill himſelf, his teſtament, as to his goods and chattels is void, but as to his lands is good. *A ſelo de ſe.*

Plow. 261.

Fitz. Dec. 26. A man that is outlawed in a perſonal action cannot make a teſtament of his goods and chattels ſo long as the outlawry doth continue in force; but of his lands he may make a teſtament. An outlawed perſon.

Fitz. Teſt. 1. The head or any of the members of a corporation may not make a teſtament of the lands or goods they have in common; for they ſhall go in ſucceſſion. A corporation.

A villain cannot make a teſtament of his lands or goods, after the lord hath ſeiſed them. A villain.

But here note, that howſoever the teſtaments of traitors, aliens, felons, outlawed perſons, and villains be void, as to the King, or Lord that hath right to the lands or goods by forfeiture or otherwiſe, yet it ſeems the teſtament is good againſt the teſtator himſelf, and all others but ſuch perſons only. And here note further alſo, by the civil law alſo the teſtament of divers others, as excommunicate perſons, hereticks, uſurers, inceſtuous perſons, ſodomites, libellers, and the like, are void. But, by our law, the teſtaments of ſuch perſons, at leaſt as to their lands, are good by the ſtatutes that do enable men to deviſe their lands. But all other perſons whatſoever, male or female, old or young, lay or ſpiritual, rich or poor, at any time before their death, whilſt they are able to ſpeak ſo diſtinctly, or write ſo plainly, as another may underſtand them, and underſtand that they underſtand themſelves, may make teſtaments of their lands, goods, and chattels; and that, albeit they have ſworn to the contrary: and none are reſtrained of this liberty, but ſuch as are before named. See more *infra* to this matter (2).

Swinb. 155. &c. See the Stat. 31 & 34 H. 8. Perk. ſect. 496. *

See more infra at Num. 7. Swin. 9. 131, 324. 125.

The ſecond thing, required to the making of a good teſtament, is, that he that doth make it have, at the time of the making of it, *animum teſtandi*, *i. e.* a mind to diſpoſe, a firm reſolution and adviſed determination to make a teſtament; otherwiſe the teſtament will be void: for it is the mind, not the words, of the teſtator, that doth give life to the teſtament: for if a man raſhly, unadviſedly, incidently, jeſtingly, or boaſtingly, and not ſeriouſly, write or ſay that ſuch a one ſhall be his executor, or have all his goods, or that he will give to ſuch a one ſuch a thing; this is no teſtament, nor to be regarded. And the mind of the teſtator herein is to be diſcovered by circumſtances: for if at the time he be ſick, or ſet himſelf ſeriouſly to make his teſtament, or require witneſſes to bear * witneſs of it, it ſhall be deemed in earneſt; but if it be by way of diſcourſe only, or of ſomewhat he will do hereafter, or the like, it ſhall be taken for nothing. Secondly, in reſpect of the mind of him that doth make it. * P. 405.

Swinb. 283, 284, 285, 286.

The third thing, required in a good teſtament, is, that the mind of the teſtator, in the making of it, be free, and not moved by fear, fraud, or flattery: for when a teſtator is moved to make his teſtament by fear, or circumvented by fraud, or overcome by ſome immoderate flattery; the ſame is void, or at leaſt voidable by exception. And therefore if a man by occaſion of ſome preſent Thirdly, in reſpect of the occaſion or motive of it.

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(1) By ſtatute 12 *Geo.* 3. *c.* 20. every perſon arraigned for felony or piracy, who ſhall ſtand mute, or not anſwer directly to the offence, ſhall be convicted thereof, and the court ſhall thereupon award judgment and execution againſt the perſon ſo ſtanding mute, in the ſame manner as if he had been convicted by verdict or confeſſion; and ſuch judgment ſhall have all the ſame conſequences in every reſpect as if ſuch perſon had been convicted by verdict or confeſſion of ſuch felony or piracy, and judgment had been thereupon awarded.

(2) And further, as to what perſons are capable of making teſtaments, in 2 *Bl. Com.* 497.—*Bac. Abr.* Wills (B.)—*Vin. Abr.* Deviſe (A.)

fear, or violence, or threatening of future evils, do at the ſame time, or afterwards by the ſame motive, make a teſtament; this teſtament is void, not only as to him that put him ſo in fear, but as to all others, albeit the teſtator confirm it with an oath. But if the cauſe of fear be ſome vain matter, or being weighty is removed, and the teſtator doth afterwards, when the fear is paſt, confirm the teſtament; in this caſe, perhaps the teſtament may be good. And if a man by occaſion of ſome fraud or deceit be moved to make a teſtament, if the deceit be ſuch as may move a prudent man or woman, and if it be evil alſo, the teſtament is void or voidable at the leaſt; but if the deceit be light and ſmall, or if it be to a good end, as where a man is about to give all his eſtate to ſome lewd perſon from his wife and children, and they perſwade the teſtator that the lewd fellow is dead, or the like, and thereby procure him to give his eſtate to them, this is a good teſtament. And one may by honeſt interceſſions, and modeſt perſwaſions, procure another to make himſelf, or a ſtranger, executor to him, or the like, and this will not hurt the teſtament. Alſo a man may uſe fair and flattering ſpeeches to move the teſtator to make his teſtament, and to give his eſtate unto himſelf or ſome friend of his; except it be in caſe where the flatterer doth firſt beat or threaten him, or put him in fear, or to his flattery joineth fraud and deceit, or the teſtator is a perſon of weak judgment, or under the danger of government of the flatterer, as when the phyſician ſhall perſwade his patient under his hands to make his teſtament, and give his eſtate to himſelf; or the wife attending on her huſband in his ſickneſs ſhall neglect him, or continually provoke him to give her all; or where the perſwader is importunate and will have no denial; or when there is another teſtament made before; for in all theſe caſes, the teſtament will be in danger to be avoided. And if I be much privy to another man's mind, and he tell me often in his health how he doth intend to ſettle his eſtate, and he being ſick, I do of mine own head draw a will according to his mind before declared to me, and bring it to him, and aſk him whether this ſhall be his will or no, and he doth conſider of it, and then deliver it back to me, and ſay, yea; this is a good teſtament: but if otherwiſe ſome friends of a ſick man of their own heads ſhall make a will, * and bring it to a man in extremity of ſickneſs, and read it to him, and aſk him whether this ſhall be his will, and he ſay yea, yea; or if a man be in great extremity, and his friends preſs him much, and ſo wreſt words from him, eſpecially if it be in advantage of them, or ſome friends of theirs; in theſe caſes, the teſtaments are very ſuſpicious.

* P. 406.

But as touching theſe two laſt things, *Quære* how they ſhall avail in the wills of land, which are not regulated ſo much by the civil law (1).

Fourthly, in reſpect of the manner and form of the diſpoſition.

The fourth thing, required in the making of a good teſtament, is, that the form and order, that the law preſcribeth, be obſerved in the diſpoſition: and therefore, 1. that there be an executor named in all teſtaments of goods and chattels, and that that executor named be capable of the executorſhip; for this is ſaid

Swin. 111. Bro. Teſt. 201.

1. Naming of an executor.

(1) A will of lands, made by the permiſſion and under the control of the ſtatutes reſpecting wills, is conſidered by the courts of law not ſo much in the nature of a teſtament, as of a conveyance declaring the uſes to which the land ſhall be ſubject.—ſee 2 *Bl. Com.* 378.

to

to be the head and foundation of the teſtament: for if there be never ſo many legacies given, and no executor made, this diſpoſition is but a codicil, and cannot properly be called a teſtament: for in this caſe, the party dead is ſaid to die inteſtate, and the adminiſtration of his goods muſt be granted to the widow, or next of kin; whereas, on the other ſide, if an executor be appointed, albeit there be no legacy given, yet this diſpoſition is, and is properly ſaid to be, a teſtament. 2. If the teſtament be of lands or tenements, it muſt be in writing, and it muſt be committed to writing at the time of the making thereof (1) and it is not ſufficient that it be put in writing after the death of the teſtator, being firſt made by word of mouth only, for then it is but *nuncupative* ſtill. But if the teſtament be firſt made by word of mouth, and be afterwards written, and then brought to the teſtator, and he approve it for his teſtament; or if the teſtator, when he doth declare his mind, doth appoint that the ſame ſhall be written, and thereupon the ſame is written accordingly in the life-time of the teſtator; theſe are good teſtaments of land, and as good as if they were written at the firſt. If therefore one be very ſick, and another come to him, and aſk him whether his wife ſhall have his land, and he ſay yea, and a clerk being preſent doth put this in writing, without any precedent commandment or ſubſequent allowance of the ſick man; this is no good teſtament of the land. So if one declare his whole mind before witneſſes, and ſend for a notary to write it, and die before he come, and he write it after his death; this is no good teſtament for his lands, but a good *nuncupative* will for his goods and chattels, except he declare his mind to be, that it ſhall not be his will unleſs it be put in writing, for then perhaps it may not be a good will for his goods and chattels. So if he that doth write the will cannot hear the party ſpeak, and another that ſtands by the ſick man doth tell him what he doth ſay; in this caſe, if there be none others preſent * to prove that he reported the very words of the ſick man, this will be no good teſtament of the land. But if a Notary take direction from the ſick man for his will, and after go away and write it, and then doth bring it again and read it to the teſtator, and he approve it; or if it be written from his mouth by the Notary according to his mind, and his mind were to have it written, albeit it be not ſhewed or read to him afterwards; theſe are good teſtaments. So if the notary do only take certain rude notes or directions from the ſick man which he doth agree unto, and they be afterwards written fair in his life-time, and not ſhewed to him again, or not written fair until after his death, theſe are good teſtaments of lands. If a ſick man bid the Notary make a teſtament of his lands, but doth not tell him how, and the notary make a deviſe of it after his own mind, this is no good teſtament: and yet if it be after read unto, and approved by the teſtator, it may

Stat. 32 & 3 H. 8. Perk. ſect. 476, 477. Dier 72. Plow. 345. Co. 4. 60. Dier 53.

2. If it be of lands, it muſt be in writing.

Adjudged Trin. 10. 12.

* P. 407.

(1) By the 5th *ſect.* of the ſtatute 29 *Car.* 2. *c.* 3. it is enacted that all deviſes and bequeſts of any *lands* or *tenements*, deviſable either by force of the ſtatute of wills, or by that ſtatute, or by force of the cuſtom of *Kent*, or the cuſtom of any borough, or any other particular cuſtom, ſhall be *in writing, and ſigned by the party ſo deviſing the ſame, or by ſome other perſon in his preſence and by his expreſs directions, and ſhall be atteſted and ſubſcribed in the preſence of the ſaid deviſor by three or four credible witneſſes*, or elſe they ſhall be utterly void and of none effect.—See 3 *Lev.* 86.—*Carthew* 35. 514.—3 *Mod.* 218. 262.—— But if it be a teſtament of *chattels* only, and be written in the teſtator's own hand, although it has neither his name nor ſeal to it, nor any witneſſes preſent at it's publication, yet it is a good will, if there is ſufficient proof of it's being his hand writing.—2 *Bl. Com.* 501.—*Gilb. Rep.* 260.—*Ged. Orp. Leg.* 66.

be good (1). And ſo if a teſtament be found written in the teſtator's houſe, and not known by whom, and it be read unto and approved by the teſtator, this is not a good teſtament in writing for lands and goods. 3. Uſes of lands, before the ſtatute of uſes, might, and lands and tenements deviſable by cuſtom, and goods and chattels may be diſpoſed by word without writing, and ſuch teſtaments of ſuch things ſo made are good (2). 4. It is not material in what matter or ſtuff, whether in paper or parchment, nor in what language, whether in Latin, French, or any other tongue, nor in what hand or letters, whether in Secretary hand, Roman hand, or Court hand, or in any other hand, a teſtament be written, ſo it be fair and legible that it may be read and underſtood: neither is it material whether the ſame be written at large, or by notes, or characters uſual or unuſual, as xx^s for twenty ſhillings, or when the figure [2] is uſed inſtead of the letter *A.* if it be uſual in the teſtator's writing, or the like, for the teſtament is good notwithſtanding. So alſo if ſome words be omittted, or ſentences improper uſed, when the intent and meaning is apparent, as where a man ſaith, [I make my wife of this my laſt will and teſtament] leaving out the word [executrix] yet the teſtament is good, and this ſhall be underſtood: but if it be ſo done as it cannot be read, or by reading the mind of the teſtator cannot be known, then is the teſtament void and of no force. In the like manner as a *nuncupative* will is, when the words ſpoken are ſo ambiguous, obſcure and uncertain, that thereby the meaning of the teſtator cannot be known nor underſtood. 5. Where writing is needful, (as in the caſe of diſpoſition of land it is,) there ſealing of the teſtament, or ſubſcribing of the teſtator's name, is not neceſſary (3). And therefore if a man by himſelf, or another, do make a teſtament of his land, and do not put his ſeal or name to it, if he agree to it, this is a ſufficient teſtament. * 6. If whilſt the teſtator is making his will, and whilſt he intendeth to proceed further at that time, either by adding, diminiſhing, or altering, he be ſuddenly ſtricken with ſickneſs, or infanity of mind, whereby he cannot proceed, but gives it over in the midſt and ſo he die; it ſeems, in this caſe, the whole will is void. And yet if a man begin his will, and make perfect deviſes to one, and then of himſelf he give over until another time; or if a man make a perfect deviſe to one, and then die before he can make any deviſe to any others; it ſeems theſe are good teſtaments for as much as is done. And therefore it is ſaid, if one command another to make

3. Uſes and lands by cuſtom, and chattles deviſable without writing.

4. The matter or hand wherein and whereby it is written.

Swinb. part 4. ſect. 25. 26.

5. Sealing and ſubſcribing the teſtator's name not needful.

Perk. ſect. 475, 477.

Sixthly, interruption in the making of the will.

* P. 408.

Swinb. 6. Lit. Bro. ſect. 300. Swinb. par. 7. ſect 10. Co. 3. 31.

(1) By the 19 & 20 *ſect.* of the ſtatute of 29 *Car.* 2. *c.* 3. it is enacted that no *nuncupative* will ſhall be good, where the eſtate thereby bequeathed ſhall exceed the value of 30 *l.* that is not proved by the oaths of three witneſſes at the leaſt that were preſent at the making thereof; nor unleſs it be proved that the teſtator, at the time of pronouncing the ſame, did bid the perſons preſent, or ſome of them, bear witneſs, that ſuch was his will, or to that effect; nor unleſs ſuch nuncupative will were made in the time of the laſt ſickneſs of the deceaſed, and in his or her habitation, or where he or ſhe hath been reſident for ten days or more next before the making of ſuch will, except where ſuch perſon was taken ſick, being from home, and died before he or ſhe returned home——And that after ſix months paſſed after the ſpeaking of the pretended teſtamentary words, no teſtimony ſhall be received to prove any will nuncupative, except the ſaid teſtimony, or the ſubſtance thereof, were committed to writing within ſix days after the making of the ſaid will.——See more amply in what caſes a nuncupative will ſhall be good, and as to the time and manner of making and proving it,—in *God. Orp. Leg.* 13.—2 *Bl. Com.* 501.—*Com. Dig.* Deviſe (C.)—*Bac. Abr.* Wills (D. 2.)—*Vin. Abr.* Deviſe (Y. e.)

(2) See the note before, as to the 5 *ſect.* of the ſtatute 29 *Car.* 2. *c.* 3.

(3) But it is now under the ſtatute 29 *Car.* 2. as hath been obſerved before.——Sealing a will is not a ſufficient ſigning within the ſtatute of frauds and perjuries, per *Parker* C. B. and Barons *Clive & Smythe*, in *Smith* v. *Evans*, 1 *Wilſ. pt.* 1. *p.* 313. contrary to the opinion of *North*, *Windham*, and *Charlton*, in *Lemayne* v. *Stanley*, 3 *Lev.* 1.

his

his will, and by it to deviſe *White Acre* to *I. S.* and his heirs, and *Black Acre* to *I. N.* and his heirs, and he write the deviſe to *I. S.* and his heirs, and the teſtator die before he can write the deviſe to *I. N.* and his heirs; this is a good deviſe to *I. S.* but a void deviſe to *I. N.* and his heirs. But if a man bid the Notary write a deviſe of his land to *I. S.* upon condition, and the notary write a deviſe to *I. S.* but the teſtator dieth before he can write the condition; in this caſe the whole Deviſe is void.

Swin. 188. But a man may if he pleaſe make a Teſtament of part of his goods, and die inteſtate for the reſt, and that diſpoſition he doth make is good for ſo much. 7. The laſt thing required to the perfection of a teſtament, is, that it be proved; for if it be never ſo well made, and be in truth the teſtament of the teſtator, yet if it cannot be by proof made to appear ſo, it is but a void teſtament, and of no force at all. And therefore herein theſe things are to be known: 1. That a *Nuncupative* teſtament muſt be proved by two witneſſes at the leaſt, and thoſe muſt be ſuch as are without exception (1). 2. A written teſtament, when it is written with the teſtator's own hand, doth prove and approve itſelf, and therefore need not the help of witneſſes to prove it (2). And for this cauſe if a man's teſtament be found written fair and perfect with his own hand after his death, albeit it be not ſubſcribed with his name, ſealed with his ſeal, or have any witneſſes to it, if it be known or can be proved to be his hand, it is held to be a good teſtament, and a ſufficient proof of itſelf; but if it be ſealed with his ſeal, and ſubſcribed with the name of the teſtator, and can be proved by witneſſes, it is the more authentic. And when it is found amongſt the choice evidences of the teſtator, or faſt locked up in a ſafe place, it is the more eſteemed: but if it be written in another hand, and the teſtator's hand and ſeal, or one of them not to it, albeit it be found in ſuch a place as before, yet ſome proof will be expected of it further by witneſſes in that caſe. And if a writing be found under the teſtator's own hand, yet if it be but a ſcribling writing written copy-wiſe, with a great diſtance between every line, without any date, in ſtrange characters, with many interlinings, and lying amongſt his void papers, or the like; this will not be * eſteemed a ſufficient teſtament, nor a good proof of it; but it ſhall be accounted rather a draught or image of the teſtator's will for a direction to him after to make his will by; and yet if it can be proved that the teſtator did declare himſelf that this ſhould be his will; this will be a good teſtament, and a good proof of it. 3. If it be proved the teſtator ſaid his teſtament was in ſuch a ſchedule in the hands of *I. S.* and *I. S.* produce a writing depoſing it to be the ſame, it ſeems this is a ſufficient proof; but if he ſay withall it is written with his own hand, then it ſeems ſome other proof, as by comparing hands, or the like, that it is his hand wherein it is written, will be expected. 4. If the witneſſes will prove the writing produced to be the laſt will of the teſtator, or that he ſaid, it was, or it ſhould be his laſt will, or that it is the ſame writing that was ſhewed unto them, and

Seventhly, in reſpect of the proof of it; and what ſhall be ſaid a ſufficient proof of a teſtament, or not.

Swin. part. 7. ſect. 13. par. 4. ſect. 15.

* P. 409.

(1) See the note before as to the 19 & 20 *ſect* of the ſtatute of Frauds: — ſee alſo the 21ſt *ſect.* of that ſtat. — — By ſtat. 4 *Ann. c.* 16. *ſ.* 14. it is declared that all ſuch witneſſes as are and ought to be allowed to be good witneſſes upon trials at law, by the laws and cuſtoms of this realm, ſhall be deemed good witneſſes to prove any nuncupative will, or any thing relating thereto.

(2) See note 1 to page 391.

Witneſs competent to prove a teſtament.

whereunto they are witneſſes, albeit they never heard it read, or ſet their hands to it, it is a ſufficient proof. 5. All perſons male and female, rich and poor, are eſteemed competent witneſſes to prove a will; ſave only ſuch as are infamous, as perjured perſons, and the like; and ſuch as want underſtanding and judgment, as children, infants, and the like; and ſuch as are preſumed to bear affection, as kindred, tenants, ſervants and the like. A legatee is reputed a competent witneſs to prove any other part of the will, but his own legacy, or to prove any thing againſt himſelf touching his own legacy, but not otherwiſe. And therefore where there be two witneſſes of a will, wherein each of them hath ſomewhat bequeathed unto himſelf; this will cannot be ſufficiently proved for thoſe legacies; but for the reſt of the will it may be ſufficiently proved (1). 6. Where there is no queſtion nor oppoſition moved or had about or againſt a teſtament, there the oath of the executor alone is eſteemed a ſufficient proof of it; and in that caſe regularly no other proof is required; and where more proof is neceſſary, as in the caſes before, it is in the diſcretion of the ordinary, what proof to admit and allow; and thoſe witneſſes for number, nature, and quality; or that other proof, that he doth deem and accept for ſufficient, is ſufficient; and the teſtament ſo proved by ſuch witneſſes, or other proof, is ſufficiently proved (2). And of this queſtion ſee more *infra*, at *numb.* 7. Swinb. part 4. ſect. 21.

5. Where, and how a teſtament good in its beginning may become void by matter *ex poſt facto*, or not.

A teſtament, ſufficient and good in it's creation and beginning, may afterwards become void by divers means, as firſt by countermand or revocation; and this is ſometimes by the party himſelf that made it, and ſometimes it is by another; and ſometimes it is expreſſed, and ſometimes it is implied; for it is a rule, that any act or thing done, or words ſpoken, by the teſtator after the teſtament made, or that doth alter or croſs all or part of his teſtament made before, is a revocation of it, or of that part thereof that is ſo croſſed and altered. And therefore if a feme ſole make a teſtament, * and after take a huſband; by this the teſtament is revoked. And if a man make a teſtament of land, and after make a feoffment of the ſame land, which feoffment is not good for ſome defect in the livery of ſeiſin, or otherwiſe, ſo that the feoffor dieth ſeiſed of the land notwithſtanding; hereby the teſtament as to this land is revoked (3). So if a man make a latter teſtament, and therein by expreſs words doth revoke the former teſtament; or if a man by any writing, or by word of mouth, (for one may by word of mouth revoke a will Co. 4. 61. Lit. ſect. 168. Plow. 344. 341. Swin. part 7. ſect. 14, 15. Perk. ſect. 478. Co. 3. 36. 8. 82. 83.

1. By countermand or revocation.

* P. 410.

(1) See the ſtat. 25 *Geo.* 2. *c.* 6. "for putting an end to doubts and queſtions relating to the atteſtation of "wills and codicils concerning real eſtates."—It enacts, that beneficial deviſes, legacies, eſtates, *&c.* given to any perſon who ſhall atteſt the execution of a will or codicil after the 24th of *June* 1752. ſhall be void, and ſuch perſon ſhall not be admitted a witneſs to the execution of ſuch will or codicil.—That where lands are charged by will or codicil with debts, any creditor whoſe debt is ſo charged, who ſhall atteſt the execution, ſhall be a good witneſs.—That a legatee who atteſted the execution, and who has been paid, or has accepted or releaſed, or has refuſed to accept his legacy, upon tender thereof; ſuch legatee ſhall be a witneſs.——See fully as to the occaſion and operation of this ſtat. in 2 *Bl. Com.* 377.—*Windham* v. *Chetwynd*, 1 *Burr.* 414.

(2) A will ſhall not be read on proof of a witneſs's hand unleſs there be poſitive proof that he is dead, *Biſhop* v. *Burton*, *Com. Rep.* 614.—and in *Townſend* v. *Ives*, 1 *Wilſ. Rep.* 216. it is ſaid to be a rule, that *all* the witneſſes, if living, muſt be examined to prove the will.—See more amply as to what ſhall be a ſufficient proof of a will, in *Bac. Abr.* Wills (D. 3.)—*Eq. Ca. Abr.* Wills (A.)—*Vin. Abr.* Deviſe (N. 13.)

(3) An alteration of circumſtances may be a revocation of a will of lands as well as of a perſonal eſtate, and that, notwithſtanding the ſtatute of Frauds and Perjuries, which does not extend to an implied revocation, *per Lord Keeper*, in *Brown* v. *Thompſon*, 1 *Eq. Ca. Abr.* 413.—The numerous caſes reſpecting implied revocations will be found, interſperſed amongſt the caſes reſpecting expreſs revocations, in the books referred to in a ſubſequent note.

Dier 310. 34 Eliz. B. R. Burton's caſe.

in writing, albeit it be of land) (1), do expreſly revoke a former teſtament that he hath made, and make no new teſtament, (for ſo a man may do, and die inteſtate if he will;) or if a man make a latter teſtament, and make no mention of the former teſtament; all theſe are countermands of the former teſtament. And the latter teſtament doth always revoke the former; and that, albeit the executor of the latter do refuſe the executorſhip, or die during the life of the teſtator, or after his death; and albeit the King be made executor of the former; and albeit the former be a written, and the latter but a *nuncupative* teſtament: and this holdeth true in a teſtament of lands, as well as in a teſtament of goods and chattels; but otherwiſe it is *è converſo*; for however a man may by word avoid a will made in writing that is good, yet a man cannot by word make good and affirm a will made in writing that is void. And therefore if a man deviſe his land in writing to *I. S.* and his heirs, and *I. S.* die before the deviſor, and after the deviſor ſay by word, that the heirs of *I. S.* ſhall have the land, as *I. S.* ſhould have had it if he had lived, this verbal declaration will not affirm the diſpoſition. Alſo the latter teſtament doth infringe the former, albeit there be no mention made in the latter of revoking the former; and albeit there be twenty witneſſes of the former, and but two or none of the latter; and albeit in the former the executor be appointed ſimply and without condition, and in the latter he be appointed conditionally, and the ſame condition be alſo broken, ſo that the condition be of ſomething then to come, at the time when the condition was made; but if the executor of the latter teſtament be made upon ſome condition then preſent or paſt, the condition not exiſting, the former teſtament is not revoked; and albeit the former teſtament be made irrevocable, *i. e.* that the teſtator ſay, I make this my laſt will and teſtament irrevocable; and albeit the teſtator hath ſworn not to revoke the former, the oath being alſo revoked together with the teſtament; and albeit the teſtator enter into an obligation with condition not to revoke it; but then in this caſe he doth forfeit his obligation. But the latter teſtament doth not revoke the former in theſe caſes following: 1. When the latter is imperfect in reſpect of will; *i. e.* when the teſtator dieth whilſt he is making of * it, and before he can finiſh it; or when it is vehemently ſuſpected that the teſtator was compelled to make the latter by fear or violence; or induced to make it by fraud and deceit; or when the former was made by the teſtator whilſt he was in his good and perfect mind and memory, and the latter is made by him when he is *inops mentis*; or when the latter is made by the perſwaſion and for the benefit of certain perſons, when the teſtator is in extremity or ſickneſs; unleſs it appear plainly to be the expreſs will of the teſtator to revoke the former; or unleſs the teſtator himſelf did dictate the latter; or in caſe the latter be in favour of the children of the teſtator

Condition.

* P. 411.

(1) But now by the 6th *ſect.* of the 29 *Car.* 2. *c.* 3. no deviſe in writing of lands, *&c.* or any clauſe thereof, ſhall be revocable, otherwiſe than by ſome other will or codicil in writing, or other writing declaring the ſame, or by burning, cancelling, tearing, or obliterating the ſame by the teſtator himſelf, or in his preſence and by his direction and conſent, but ſhall continue, *&c.* unleſs altered by ſome other will or codicil in writing, or other writing of the deviſor, ſigned in the preſence of three or more credible witneſſes declaring the ſame.—See the caſes of *Eggleſton* v. *Speke*, 3 *Mod.* 258.—and *Onions* v. *Tyrer*, 1 *Pr. Wms.* 343.— —And by the 22d *ſect.* of the ſame ſtat. no will in writing, concerning perſonal eſtates, ſhall be repealed, nor any clauſe or bequeſt therein altered by words, or will by word of mouth only, except the ſame be, in the life of the teſtator, committed to writing, and read to and allowed by him, and proved to be done by three witneſſes.

or

or others, who are to have the adminiſtration of his goods if he die inteſtate. 2. When the teſtator doth make two teſtaments, a former and a latter, both being written, and afterwards lying ſick upon his death-bed, they are both preſented unto him, and he is deſired to deliver, to one of the ſtanders by, which of them he will have to ſtand for his laſt will, and he deliver the former. 3. When the latter doth agree in all points with the former, for then both of them are as one in divers writings. 4. When in the latter teſtament there is no executor named; for then it is but a codicil or addition to the former. 5. When the latter is made upon ſome ſudden diſcontent againſt the executor of the former teſtament, and afterwards he and the executor are reconciled again: in theſe, and ſuch like caſes, the latter teſtament is no revocation of the former. If the huſband licence the wife to make a teſtament, and after her death he forbid the probate, this is a countermand of the teſtament. But note here, that revocations in general are not favoured in law; and therefore he that will avoid a former will by revocation, muſt ſee he prove it well (1). 2. A good teſtament may become void by cancelling or other deſtruction of it; as where the teſtator himſelf, or ſome other by his commandment, doth cut or tear it in pieces, deface it, or caſt it into the fire; by this means the teſtament is made void; except it be in caſe where the teſtator doth it unadviſedly, or it be done by ſome other without his conſent, or by ſome caſualty, or when he doth willingly pull away the ſeals, and then he doth afterwards ſeal it again, or where the whole teſtament is not cancelled or defaced, but ſome or the chief part thereof, as the naming the executor, or the like, for it is good ſtill for the reſidue; or where there be ſeveral papers or writings, of one, ten, or each of them, containing the whole teſtament, the cancelling or defacing ſome of them doth not hurt the teſtament, unleſs it can be proved that the teſtator's mind were to avoid it all; or where the teſtament is loſt in the life-time of the teſtator, or after; for in this caſe, ſo much as can be proved by witneſſes is ſtill in force. 3. A good teſtament may become void by alteration of the eſtate of the teſtator; as when a man, after the time of * making the teſtament, and before his death, is convicted or condemned of ſome great crime, for the which the law depriveth him of the making of a teſtament, as treaſon, felony, or the like. And yet if the crime be pardoned and purged before his death, the teſtament may be good enough. And if a man of ſane and perfect memory make his teſtament, and after become *inops mentis* as every man for the moſt part is before his death; this does not hurt the teſtament. 4. A good teſtament may become void by an intention only to alter it, when the teſtator is hindred in his intention, that it cannot take effect: and therefore if when the teſtator intendeth to alter his teſtament, or to make a new one, he be by fear or fraud forbidden or letten that he dare not or cannot

Lit. Bro. 55.

2. By cancelling of it.

Swin. lib. 7. part ſect. 16.

3. By alteration of the eſtate of the teſtator.

* P. 412.

Swinb. lib. 7. ſect. 17.

Co. 4. 62.

Fourthly, by intention to alter it.

Swinb. part 4. ſect. 18.

(1) See fully as to the doctrine of revocation of Wills, either expreſs or implied, which is no leſs material than extenſive, *Com. Dig.* Deviſe (F.)—*Bac. Abr.* Wills (G.)—*Swinb.* 523.—*Eq. Ca. Abr.* Wills (E.)—*Vin. Abr.* Deviſe (O.) to (Z.)—*God. Orph. Leg.* 51.—*Went. Off. Ex.* 20.—and the following caſes, which do not appear to be inſerted in the 4th edition of *Bac. Abr.* lately publiſhed.—*Beard* v. *Beard*, 3 *Atk.* 72.—*Carte* v. *Carte*, 3 *Atk.* 176.—*Darley* v. *Darley*, 3 *Wilſ.* 6.—*Parſons* v. *Freeman*, and others, 1 *Wilſ.* 308.—*Goodright* v. *Glazier*, 4 *Burr.* 2512.—and *Goodright* v. *Harwood*, fully reported in 3 *Wilſ.* 497: In that caſe a writ of error being brought, the judgment of the court of Common Pleas was reverſed by the court of King's Bench, and and on an appeal to the houſe of Lords in *April* 1775, the deciſion of the King's Bench was affirmed.

alter it, or the Notary or the witneſſes dare not or may not be ſuffered to come to him; as when a wife or ſome other that is to have benefit by the former will, under pretence that ſhe hath a charge from the phyſician that none ſhall come at him, or under pretence that he is aſleep, or the like, will not ſuffer any body to come at him; or when the notary and witneſſes are all preſent, and they make ſuch a noiſe or quarrelling that they hinder the effect of his intent; or when the teſtator is kept from doing it by importunate requeſts and flattering perſwaſions; in all theſe caſes, and by theſe means, the former teſtament may become void. But if it appear, that the teſtator hath no purpoſe to alter the teſtament when he is let as aforeſaid; the fear is a vain fear. If the teſtator is prohibited at another time, and not the time when he doth intend to alter the teſtament, but he hath ſundry opportunities after that time to do it, and doth it not; or if he is drawn only by the fair ſpeeches of a wife or friend; or if by the weeping or other trouble ariſing from the grief of the legatary or executor for the teſtator's ſickneſs only he is diſturbed; in theſe caſes, perhaps it may not be void. And where it is void by the prohibition of a legatary only, it is void for ſo much as doth concern him only, and not for the reſt of the teſtament.

5. A good teſtament may become void by making another of the ſame date; for if two teſtaments be found after the death of the teſtator, and it cannot be diſcerned or proved which was made former or later, the one of them doth overthrow the other, and both of them are become void, except they be both to the ſame purpoſe, or one of them be made in favour to wife and children, &c. and the other to ſtrangers. And yet in the firſt caſe alſo the teſtator by declaration of his mind, which of them he will have to take effect, may make either of them good.

Swinb. part. 7. ſect. 11. Perk. ſect. 479.

Fifthly, by making another of the ſame date.

6. A good teſtament may be made void by the declaration of the teſtator's mind; as if a man have two teſtaments lying by him, the one made after the other, and they are both ſhewed or delivered to the teſtator when he lieth ſick, and he by word or ſign declare * that he will have the former to ſtand; this declaration doth revoke the latter, and affirm the former. And where a man would revoke a will for any of theſe cauſes, he muſt preſently after the death of the teſtator put in a *caveat* or exception in that court where the will is to be proved, and thereupon proceed to queſtion it; or by a prohibition in ſome caſes he may ſtay the probate in the ſpiritual court. See more *infra* at *numb.* 12.

Sixthly, by the declaration of the teſtator.

* P. 413.

Perk. ſect. 501. Co. 1. 99. 2. 55.

6. Where a teſtament void or voidable in its inception, may become good by ſome matter or accident *ex poſt facto*: and where not.

If a woman covert, without the leave of her huſband, make a teſtament of her huſband's goods, and the huſband doth after her death connive at the probate, and deliver the goods accordingly, hereby the teſtament of the wife is become good: but if an infant, or mad-man, make a teſtament in the time of his infancy, or madneſs, and after the infant or mad-man become of full age, or ſober, before his death; it ſeems theſe teſtaments are void. And yet if the infant at his full age, or the mad-man when he is ſober, make a publication of this teſtament, it may perhaps be good.

Perk. ſect. 479. Co. 4. 61. Plow. 344.

If a man make a former and a latter will, and by the latter the former is revoked, and after the teſtator declare himſelf that the former ſhall ſtand; by this the former, that was void before, is

now become good again (1). And yet if a man make a will that is void, and it be proved after his death; this probate will not make it good, but it doth remain void, as it was before.

If a feme ſole make a will, and then take a huſband whereby the will is countermanded, and ſo become void; if her huſband die, ſo that ſhe become ſole again; this accident will not make the will good again, but it doth remain void ſtill: but perhaps, by a new publication after ſhe doth become ſole, it may become good again. See more *infra* at *numb.* 12. [illegible]

7. What ſhall be ſaid a good and ſufficient deviſe or legacy, or not.

To the making of a good and ſufficient deviſe, theſe things are requiſite. 1. That there be a deviſor, and that he be a perſon able to deviſe; and that, both in reſpect of the condition of his own perſon, and of the thing whereof the deviſe is made. 2. That there be a deviſee, and that he be a perſon capable and able to receive the thing deviſed, either at the time when the deviſe is made, or at leaſt when the deviſe is to take effect. 3. That the deviſor have at the time of the deviſe made *animum teſtandi, i. e.* a mind to make a deviſe. 4. That the will of the deviſor be free, and not drawn or coacted by fraud, flattery, fear, or the like. 5. That the deviſe be made in due manner and form. 6. That the thing deviſed be a thing deviſable. 7. That it be deviſed upon lawful terms and conditions. 8. That there be words ſufficient to make his mind known. 9. That it be proved after the death of the deviſor. 10. And if it be a deviſe of land, it is further required that the deviſor be ſolely ſeiſed of the land, and not jointly *ſeiſed with another; and that he be ſeiſed of an eſtate in fee-ſimple; and that the deviſe be in writing.

See before at Numb. 4.

Perk. ſect. 406. See before at Numb. 4. and after at Numb. 17.

* P. 414.

First, in reſpect of matter touching the deviſor, and who may be the deviſor.

And for the firſt of theſe it is to be known, that whoſoever may make a teſtament, may make a deviſe of the ſame thing of which he may make a teſtament. *Et ſic è converſo.* And whoſoever is diſabled to make a teſtament, is diſabled to deviſe by ſuch a teſtament. And therefore infants may not deviſe their lands until they be one-and-twenty years of age, nor their goods and chattels until they be fourteen years of age, (or, as ſome ſay, until they be eighteen years of age)(2). Women, that have huſbands, cannot deviſe their lands to their own huſbands or others, either or by without their huſband's conſent, albeit there be a cuſtom to enable them thereunto; but all ſuch deviſes are void. And ſpiritual perſons, as Archbiſhops, Biſhops, Deans, Archdeacons, Prebends, Parſons, Vicars, or any member of a corporation, may not deviſe the lands or goods they have in the right of their churches or corporations. And

Co. ſuper Lit. 112. 4. 61. Bro. Deviſe 32.

Perk. ſect. 496.

Secondly, in reſpect of the matter touching the deviſee: and who may be a deviſee: and by what name.

for the ſecond thing, this is to be known. 1. That regularly, whoſoever may be a grantee, may be a deviſee or legatee. And therefore a deviſe made to any perſon or perſons, male or female, children or ſtrangers, Bondmen or Freemen, Laymen or Clerks, debtors or creditors, infants or men of full age, women ſole or covert, Colledges, Univerſities, Corporations, or the like, are good. But it is ſaid, that if any legacy be given to an heretick, apoſtate, traitor, felon, excommunicate perſon, outlawed perſon, baſtard, unlawful colledge, libeller, ſodomite, uſurer, recuſant convict, it is void by the civil law, except it be in ſome

Perk. ſect. 505. 510. Swin. 222. ſee infra at numb. 18.

(1) The ſtudent will neceſſarily conſider the operation of the ſtatute of 29 *Car.* 2. *c.* 3. throughout the whole of this chapter, with reſpect to the requiſites, thereby made neceſſary either to the making or to the revocation of teſtaments, which have been mentioned before in the particular ſections of that ſtatute.

(2) See before in note 2 to page 388.

ſpecial

ſpecial caſes. And yet it ſeems a deviſe of lands to any ſuch perſon is good within the ſtatute of wills. [a] A deviſe to an infant in the womb of its mother at the time of the death of the teſtator, is void. [b] And yet if a man deviſe to ſuch an infant, and he happen to be born before the death of the teſtator, it ſeems in this caſe the deviſe is good; for it is a rule, [c] that the deviſee muſt be capable of the thing deviſed at the time of the death of the deviſor, if it be then to take effect in poſſeſſion; or if it be a remainder, he muſt be capable of it at the time when the remainder ſhall happen, or otherwiſe the deviſe is void (1). And a man may deviſe his lands, goods or chattels, to his own wife, as well as to any another. 2. But he that may be thus a deviſee, and is capable of a thing deviſed, muſt be certainly named and deſcribed; for if a deviſe be to a perſon altogether incertain, the deviſe is altogether void. And therefore if I give my land to my beſt friend, or to my beſt friends, theſe are void deviſes. So if I give my land to a Vicar, and ſay not to what Vicar; this deviſe is void, and no averment will help in this caſe. If one have two ſons of one name called *I. S.* and he deviſe to his ſon *I. S.* without any diſtinction; it ſeems this deviſe is void for uncertainty: but in * this caſe perhaps an averment which ſon is meant, may help. So if one give to *I. S.* 20*l.* and there be two or more of that name, this deviſe is void; except it may be proved by ſome thing which of them he meant. So if one ſay in his teſtament, I give to one of the world 10*l.* this deviſe is void for incertainty. So if one give him 10*l.* whoſe name is written in a ſchedule in the cuſtody of ſuch a man; and in truth there is no ſuch ſchedule in the cuſtody of ſuch a man to be found; or if there be no name written therein; it ſeems theſe legacies are void for incertainty. So if a man give a legacy to a man incertain, and no ſuch man is to be found, and the meaning of the teſtator cannot be known; this deviſe is void. And yet if a man by his will ſay thus, I deviſe to him that ſhall marry my daughter; this is a good deviſe; and he that doth marry my daughter in my life-time, or after my death, ſhall have it. And if a man deviſe any thing *ad pias cauſas*, as to the church, or to the poor, not expreſſing what church or poor; this perhaps may be a good deviſe. So if a man give 20*l.* to his kindred; it is ſaid this is a good deviſe, and that a reaſonable expoſition ſhall be made of it, as near the intent of the teſtator as may be; *viz.* that thoſe in the next degree ſhall have it firſt, and then thoſe in the next degree to that ſhall have it afterwards; and if it be a deviſe to the kindred of another man, that they ſhall have it equally. (*Sed quære* of this deviſe, for it ſeems altogether uncertain.) So if a man give to *I. S.* or *I. D.* 20*l.* this is held to be a good deviſe, albeit it be ſomewhat incertain, and the disjunctive ſhall be taken for a copulative, and ſo *I. S.* and *I. D.* ſhall take both by this deviſe; but if, in this caſe, one of them be nearer of kin than the other, then it is ſaid he ſhall have it for his life, and the other afterwards. And if one deviſe 20*l.* to *A.* or *B.* which of them *I. S.* will appoint; this is a good deviſe, and he that *I. S.* ſhall appoint

[a] Dier 303. 304. B. R. Curia. Mic. 13. Jac.
[b] New terms of the Law, tit. deviſe. See infra numb. 11. c. 9. Ja. B. R.
Lit. ſect. 168. Lit. Bro. ſect. 55.
M. 10 Jac. Curia B. R. Crumpe v. Bodie.
Co. 6. 68. Swinb. 293. 294. 295. 296.
Swinb. part 7. ſect. 9.
Plow. 345. Co. 1. 105. 155. Perk. ſect. 508.

Incertainty.
Averment.
* P. 415.

(1) The law is ſaid to be now clear, that a deviſe to an infant *en ventre ſa mere* is good enough, though he be born after the death of the teſtator, and *he ſhall take by way of executory deviſe when he is born*; per *North* Ch. J.—*Freem.* 293.—See more amply as to a deviſe to an infant *in ventre ſa mere*, in *Vin. Abr.* Deviſe (I. 9.)—*God. Orp. Leg.* 102.—*Bac. Abr.* Infancy (C.)—*Swinb.* 251.—*Fearne on con. rem.* 3d edit 324. 401. 425.

ſhall

ſhall have it. And if one deviſe to *I. S.* and his children; this is a good deviſe and certain enough; and hereby he and his children ſhall take the thing deviſed together. 3. And as the perſon to whom the deviſe is made, muſt be capable, and certainly deſcribed and named, ſo muſt he be capable by that name by which the deviſe is made to him, or otherwiſe the deviſe is void. And therefore if a deviſe be to the heirs of *I. S.* *I. S.* being living; this deviſe is void. And yet if lands or goods be deviſed to the executor of *I. S.* and *I. S.* die before the teſtator and make executors; this is a good deviſe to the executors. And if a man deviſe his land to *I. S.* for life, the remainder to the next of kin, [or next of blood] of *I. S.*; this is a good deviſe of the remainder. And if a man deviſe goods to the pariſhioners of the pariſh of *S.* to the uſe of the church; this is a good deviſe, and the church-wardens may recover it. And if a man deviſe *eccleſiæ ſanctæ Andreæ de* * *Holborne*, it ſeems this is a good deviſe to the Parſon of that church. And if a man deviſe to the City of *London*, Univerſity of *Oxford*, or to Queens College in *Oxford*, theſe are good deviſes. But if one deviſe to the commonalty of a guild that is not incorporate, as to two of the middle men of the guild of the fraternity of *White-acres* in *London*, or the like; this deviſe is void (1). 4. That if the perſon be capable, well named, and capable by that name, if his name be truly ſet down, yet if his name be not ſo, but miſtaken, the deviſe is void. And therefore, if one intending to give 20 *l.* to *I. S.* deviſe to *I. N.* 20 *l.* this deviſe is void both to *I. S.* and *I. N.* except the perſon be certainly denoted and deſcribed by ſome other circumſtance, as to *I. N.* the ſon of *I. S.* my landlord, or the like. So if one deviſe to the abbot of St. *Peter*, when the foundation is the Abbot of St. *Paul*; this deviſe is void. And if one deviſe to a corporation, and there be none of that name at the time of the deviſe, nor during the life of the teſtator, this deviſe is void; and ſo alſo it ſeems the law is, if there be a Colledge made after of that name. But if one deviſe a thing to the wife of *I. S.* and before the deviſor die, *I. S.* die, and ſhe take another huſband, and is called by another name, yet this deviſe is good. So if one give a legacy to *I. S.* Dean of *Pauls*, and the Chapter there, and their ſucceſſors; and after, before the death of the deviſor, *I. S.* die, and another is made dean; yet this deviſe is good notwithſtanding this miſtake (2). For the third and fourth thing required in a good deviſe; ſee before at *numb.* 4. *part.* 2, 3. And for the fifth thing, it is to be known, firſt, that lands and tenements deviſable by cuſtom, may be deviſed by a nuncupative will without any writing for any time whatſoever, as uſes at the common law that are now within the ſtatute might have been. Alſo thoſe uſes that remain at the common law, and are not within the ſtatute, may be deviſed by word without any

Fits. Deviſe 27. Plow. 523. Perk. ſect. 509, 510. Bro. Corporation 55.

* P. 416.

Miſnaming.

Dier 4. Perk. ſect. 505. Swin. 289, 290.

Plow. 344.

Fifthly, in reſpect of the matter touching the matter and form of the deviſe. And how a deviſe may be made.

Co. ſuper Lit. 111. Plow. 345. Swinb. par. 1. ſect. 12.

(1) By the common law every corporation had a capacity to purchaſe lands for themſelves and their ſucceſſors; but they are excepted out of the ſtatute of wills: ſo that no deviſe of lands to a corporation by will is good; except for charitable uſes, by ſtatute 43 *Eliz. c.* 4. which exception is greatly narrowed by ſtatute 9 *Geo.* 2. *c.* 36.—See 1 *Bl. Com.* 479. ſeventh edit.—10 *Co.* 30.—*Hob.* 136.—A deviſe to a corporation for a charitable uſe operates in the nature of an appointment, rather than a bequeſt, under the ſtatute 43 *Eliz.* —that ſtatute, being ſubſequent, is ſaid to ſuperſede and repeal the ſtatute of Wills 32 *H.* 8. but the ſtatute of frauds, being ſubſequent to the ſtatute 43 *Eliz.* renders it neceſſary, that an appointment of lands to a charity by will ſhould be atteſted by three witneſſes; otherwiſe it is void.—1 *Pr. Wms.* 249.

(2) See more amply who may take by deviſe, in *Com. Dig.* Deviſe (I.)—*Bac. Abr.* Deviſes (A.)

any writing (1). But no eſtate can be made of lands by deviſe upon the ſtatute, except the deviſe be in writing; and ſo a man may deviſe his land, albeit he make no executor; for an executor hath nothing to do with the freehold of land. Alſo goods and chattels, leaſes for years of lands, wards, villains and the like, may be deviſed by words without any writing at all. And yet it ſeems queſtionable whether a leaſe for years of a rent, common or ſuch like thing, be deviſable by word without writing. Secondly, the form of words in a deviſe is not at all regarded; and therefore if one ſay, I give, inſtitute, deſire, appoint, or will, that *I. S.* ſhall have my land, or that *I. S.* ſhall have 20 *l.* or let *I. S.* have my land or 20 *l.* all theſe deviſes are as good as if he ſay, I deviſe to *I. S.* my land or 20 *l.* And therefore if one at this day ſince the ſtatute of uſes deviſe that his feoffees of the land ſhall be * ſeiſed of the land to the uſe of *I. S.* and his heirs; or to the uſe of *I. S.* and the heirs of his body; or if ſuch a man deviſe that his feoffees ſhall make an eſtate of the land to *I. S.* and his heirs; or to him and the heirs of his body; this is a good deviſe of the land in fee-ſimple, or fee-tail. And if a man make a feoffment of his land to the uſe of his laſt will, and then deviſe that his feoffees ſhall be ſeiſed to the uſe of *I. S.* this is a good deviſe of the land *per intentionem*. And if I deviſe that *I. S.* ſhall have, hold, and occupy my land for his life; this is a good deviſe of the land for his life. If a man have a leaſe for years of land, and he deviſe his leaſe, or his term, or his ferm, or the profits or occupation of the land; by either of theſe deviſes his whole leaſe and all his intereſt in the land is given, as well as by any other form of words. 3. A man may deviſe lands, teſtaments, or hereditaments in poſſeſſion, in fee, for life, or years; or he may deviſe it in reverſion, *viz.* to one for life, the remainder to another in fee, or in tail, or in any other ſort, as a man may grant it by his deed, and ſuch deviſes are good. But if the fee-ſimple of land be deviſed to one, the remainder cannot be deviſed to another, albeit the firſt deviſe be but conditional. And therefore if land be deviſed to *I. S.* and his heirs, and if he die without heirs, that it ſhall remain to *I. N.* and his heirs; this is a void remainder to *I. N.* So if a man deviſe his land to *I. S.* in fee, *ita quod ſolvat I. N.* twenty pounds, and if he fail that it ſhall remain to *I. N.* and his heirs, this remainder to *I. N.* is void; for if *I. S.* fail of payment, *I. N.* ſhall not enter and have the land, but the heir of the deviſor (2). And yet perhaps a rent may be deviſed after this manner. Howbeit if another man have a rent-charge of 20 *l.* a-year iſſuing out of my land for twenty years; and he deviſe this unto me until I have levied a hundred pounds by way of retainer, the remainder to *I. S.*: this remainder is not good. 4. A deviſe may be of lands, goods or chattels, ſimply and abſolutely, or conditionally; the ſimple deviſe alſo may be *in preſenti*, or *in futuro*. And therefore as a deviſe to one and his heirs in *preſenti*, is good; ſo a deviſe to one and

Plow. 345. Swinb. part 2. ſect. 12. Dier 140.

Swin. part 4. ſect. 4. Plow. 23. Lit. Bro. ſect. 316. Dier 23.

* P. 417.

Paſch. 9. Jac. Newman's caſe.

Plow. 546. Co. 4. 66. 8. 95.

Dier 122. 33. 128. Co. 2. 83. 6. 42.

Dier 4. 33.

Dier 139. 140.

Plow. 523. Perk. ſect. 16.

See Condition Co. 8. 95.

Conditions.

(1) See the notes before, as to the ſtatute of 29 *Car.* 2. *c.* 3.

(2) See the caſe of *Marks* v. *Marks*, 10 *Mod.* 419, where the teſtator deviſed lands to his wife for life, remainder to his ſecond ſon *C.* in fee; provided that if his third ſon *D.* ſhould within three months after the wife's death pay 500 *l.* to *G.* his executors or adminiſtrators, then he deviſed to *D.* and his heirs,—This deviſe to *D.* was held to be a good executory deviſe.—See *Fearne on Cont. Rem.* 3d edit. 303.

his heirs after the death of *I. S.* is good. If I deviſe land to *I. S.* and his heirs on condition, as, ſo as, or *ita quod*, he pay ten pounds to *W. S.* or paying to *W. S.* ten pounds; or *ad ſolvendum* ten pounds to *I. S*; the deviſe, in all theſe caſes, is a good conditional deviſe: and if the condition be not performed or broken; the eſtate is ended, and the heir may take advantage of it. And therefore if lands be ſo given to the heir, the condition is idle, becauſe none can enter but him. And if I deviſe that if *I. S.* pay my executors twenty pounds, that he ſhall have *White acre* to him and his heirs for ever, or for life, *&c.* this is a good deviſe, and after the contingent ſhall take effect accordingly: and in this caſe and ſuch like, the heir of the deviſor muſt keep the land, until * the contingent do happen. In like manner as if it be a chattel, the executor ſhall keep the thing until the condition be performed; and after a condition broken, he ſhall take advantage of it. 5. A deviſe may be alſo with a limitation, as in the caſes before; as where one gives land to another and his heirs, ſo long as *I. S.* ſhall have heirs of his body; or where one doth deviſe his land to *A.* his ſon and his heirs for ever, paying to *B.* his brother twenty pounds when he ſhall come of age; and then that he ſhall enter and have it to him and his heirs, and if he die without heirs of his body, the ſaid *B.* then living, then that *B.* his heirs ſhall have it in the ſame manner: and theſe and ſuch like deviſes are good. 6. A man that is ſeiſed of land in fee, may deviſe that his executors ſhall ſell it; or may deviſe it to his executors to ſell; or deviſe it to his executors, and that they ſhall ſell it; and theſe deviſes are good. 7. A deviſe may be of a rent, or of land reſerving a rent, with clauſe of diſtreſs; as if a man deviſe land to *I. S.* paying ten pounds by the year to his wife, and if it be unpaid, that ſhe ſhall diſtrain for it; this is a good deviſe. But a warranty cannot be made by will. And yet if a man deviſe land to another for life, or in tail, reſerving a rent; in this caſe the heirs of the deviſor ſhall be bound to the warranty in law, and the deviſee ſhall take advantage of it. 8. A man may deviſe his land to one, and deviſe a rent out of the ſame land to another, and theſe deviſes are good. So a man may deviſe his land to one in fee, and after deviſe the ſame land to another for life or years; and theſe are good deviſes, and may ſtand together. So alſo if a man in the fore part of his will, by general words deviſe all his land to one in fee, and in the latter part of his will, deviſe ſome ſpecial part of it to another in fee; theſe deviſes are good and ſhall ſtand together: as for example, if one have a farm, and in the firſt part of his will, give this farm to one, and in the latter part of his will give one cloſe (a part of this farm) to another; or if a man deviſe all his land in *B.* (which is in the county of *Glouceſter*) to *A.* his daughter, and in the latter part of his will deviſeth all his land in the county of *Glouceſter*, in the poſſeſſion of *I. S.* to his ſon; and part of the land in *B.* is in the poſſeſſion of *I. S.* and in *Glouceſterſhire*; theſe are good deviſes and ſhall ſtand together. But otherwiſe it is when the general clauſe doth come laſt, as where one doth give his land to *A.* his daughter, and in the latter part of his will doth give all his land in *Hertfordſhire*, and in the poſſeſſion of *I. S.* to *W.* and the land given to *A.* is in *Hertfordſhire*, and in the poſſeſſion of *I. S.*; in this caſe the deviſes will not ſtand together, for the firſt deviſe is void: and ſo

* P. 418.

Limitation.

Clauſe of diſtreſs.

Warrantia.

Co. ſuper Lit. 112. 113, 236.

Dier 348. 100. 8. 84. 85.

Co. ſuper Lit. 386.

Plow. 523. 540. Dier 357. Co. 8. 94. 83.

38 Eliz. Cy. B. A. good diviſe times.

so also it is where both the deviſes are particular; as where firſt in a man's will, he doth give *White-acre* to *A.* and his heirs, and after in his will he doth give *White-acre* to *B.* and his * heirs; in this caſe the firſt deviſe to *A.* is void. And yet in this laſt caſe, ſome have held the deviſes ſhall be good, and that *A.* and *B.* ſhall be joint-tenants: *ideo quære.* If one deviſe all his land to *I. S.* and his heirs, excepting twenty pounds for ſeven years, which he willeth ſhall be imployed for his children; this is a good deviſe of this ſum of twenty pounds a-year. 9. And a man may deviſe his land for ſo many years as *I. S.* ſhall name, and after appoint that his ſon ſhall have it during the minority of his ſon, and both theſe deviſes may ſtand together: and therefore if *A.* be poſſeſſed of the manor of *D.* for years, and he deviſeth all his term to his eldeſt ſon if he live ſo long, and if he die before he have any iſſue of his body, then to his younger ſon in the ſame manner, but withal he doth appoint that his wife ſhall have the occupation of the land until his eldeſt ſon be one-and-twenty years of age; theſe deviſes ſhall ſtand together, and the wife ſhall enjoy the manor for that time, by this deviſe. 10. A man may deviſe a term of years by way of remainder: as for example, a man that is poſſeſſed of a term of years of land, may deviſe it to *I. S.* for life, the remainder to *I. D.* or to *I. S.* for life, and that it ſhall after remain to *I. D.* or to *I. S.* for ſo many years as he ſhall live, and after to *I. D.* or in any ſuch like manner; theſe are good deviſes both to the firſt, and to him in remainder alſo by way of executory deviſe, though not by way of remainder; and in this caſe, the firſt deviſee cannot hinder the ſecond deviſee of the remnant of the term. But a man cannot by deed in his life-time grant his term in this manner: nor if a man be poſſeſſed of a term can he intail it by his will; and therefore if a man poſſeſſed of his term of years of land deviſe his term or his land to *I. S.* and his heirs, or to *I. S.* and the heirs of his body, or to *I. S.* and his iſſues, the remainder to *I. D.* this remainder is void, and it is a good deviſe of the whole term to *I. S.* and his executors (1). Alſo the uſe or occupation of a chattel perſonal may (as it ſeems) be deviſed to one for life, and afterwards to another; but yet ſo as the latter muſt have the property only, and the firſt but the occupation only: as if one deviſe that *I. D.* ſhall have the occupation of his plate for his life, and after that it ſhall remain to *I. S.* this is a good deviſe of the plate to *I. S* (2). But if the thing itſelf be deviſed to the firſt of them, then the deviſe to the ſecond is void, for the gift of a chattel perſonal for one hour, is the gift of it for ever. And ſo it did ſeem in the Lady *Davers* caſe. *Hil. 9. Car. B. R.* 11. A legacy of goods or chattels may be given to or until a

* P. 419.

Dier in his Lecture Y. & per Juſt. Dodr.

Trin. 9 Ja. B. R.

Plow. 523. 546.

Co. 8. 95. Plow. 519. 546. 516. 539. Dier 277.

Co. 10. 87. 47. Paſche. 17 Ja. B. R. Child v. Baily.

Grant.

37 H. 6. 30. Lit. Bro. ſect. 388. 334. 209.

Swin. part 4. ſect. 17.

(1) Where a term for years or any perſonal eſtate, was deviſed to one for life, with remainder over; ſuch a limitation was void at common law, and the whole property veſted in the perſon to whom it was limited for life; but the law is now ſettled, that ſuch limitations over in a *will* or by way of *truſt* are good.—*Fearne on Cont. Rem.* 3d edit. 304. — Terms for years may be intailed by *executory deviſe* or by deed of *truſt* as effectually as eſtates of inheritance, if it is not attempted to render them unalienable beyond the duration of lives in being and twenty-one years after, and perhaps in the caſe of a poſthumous child a few months more; a limitation of time, not *arbitrarily* preſcribed by our courts of juſtice, but wiſely and reaſonably adopted in analogy to the caſe of freeholds of inheritance, which cannot be ſo limited by way of remainder as to poſtpone a complete bar of the intail by fine or recovery for a longer ſpace.—See *note* 5 to 13th edit. *Co. Lit.* 20. *a.* and the authorities there collected as to this point of doctrine, and particularly the Duke of *Norfolk*'s caſe. 3 *Cha. Ca.* 1.

(2) See accordingly the caſes of *Hyde* v. *Parrat*, 1 *Pr. Wms.* 1.—*Tiſſen* v. *Tiſſen.*—*Ibid* 500.—and *Upwell* v. *Halſey*, *Ibid.* 651.

certain

certain time, or from or after a time certain or incertain; as for five years, or from, or until the marriage of *A.* or the like; and theſe diſpoſitions are good. 12. A man may deviſe his land for ſo many years as *I. S.* ſhall name, and if *I. S.* do name a certain number of years in the life-time of the deviſor, * this will be a good deviſe. But if one deviſe his land for ſo many years as his executor ſhall name, it ſeems this deviſe is not good. Plow. 524.

* P. 420.

Sixthly, in reſpect of matter touching the thing deviſed, and what may be deviſed and by what name. Deviſe of lands and teſtaments.

6. As touching the ſixth thing required in a good deviſe, theſe things are to be known. 1. That lands, tenements, and hereditaments for the nature and quality of them are deviſable as well as other things. And therefore by the cuſtom of ſome places lands in poſſeſſion, reverſion or remainder, are deviſable in fee, for life, or years; and a man that hath a leaſe for years of land may deviſe the land at his pleaſure during his term. But by the ancient common law, in favor to heirs, the lands that a man had in fee-ſimple were not deviſable by teſtament, except only in ſome ſpecial places, by the cuſtom of the place, as gavelkind lands in *Kent*, and lands within certain burrough towns, as *London*, *Oxford*, *&c.* And by the cuſtom of thoſe places ſuch lands are deviſable: and in ſome places the cuſtom is, that they may deviſe their purchaſed lands only; and in other places, that they may deviſe their lands deſcended alſo: and in ſome places the cuſtom is that they may deviſe for life only; and in other places, that they may deviſe in fee-ſimple and fee-tail alſo. And in all theſe places where ſuch cuſtoms are, they may deviſe their lands now as they might have done before the ſtatute; for the ſtatute hath not deſtroyed their cuſtom. And therefore at this day they that have ſuch lands in ſuch places, have their election either to deviſe according to the power the cuſtom doth give them, or according to the power the ſtatute doth give them; and in the firſt caſe, the deviſe is good againſt the heir for the whole; and in the laſt caſe it is good againſt him for two parts in the three only. Alſo by the common law, the uſes of land were deviſable, as goods and chattels were, at the pleaſure of him that had them. But otherwiſe. and in other caſes, lands and tenements might not be deviſed and diſpoſed by will, until 32 *H.* 8. at which time the owners of lands, tenements, rents, *&c.* were by Act of Parliament enabled to deviſe and diſpoſe their lands as followeth: he that hath any land in poſſeſſion, reverſion, or remainder by ſocage tenure, and hath no land held *in capite* or by Knight's ſervice, may deviſe all his land, or any rent, common, or other profit *apprender* out of it, to any perſon in fee-ſimple, fee-tail, for life or years, at his pleaſure. He that hath any ſuch land held of the King *in capite* by Knight's ſervice, or by Knight's ſervice and not in chief, or held of any common perſon by Knight's ſervice, may deviſe two parts thereof in three, to be divided, or any rent, *&c.* out of thoſe two parts at his pleaſure, and no more; for the third part muſt deſcend to the heir, and come to ſatisfy the Lord his duties; and therefore the deviſe of the whole land in this caſe is void for the third part. He that hath any ſuch land held by Knight's ſervice *in capite*, and other lands held by * ſocage tenure may deviſe two parts of the whole, and no more, or any rent, *&c.* out of it at his pleaſure: he that doth hold land of the King by Knight's ſervice only, and not *in capite*, as if a mean Lord by Knight's ſervice, hath alſo other lands held by ſocage tenure, he may deviſe

Dier 371. Co. 8. 83. 6. 16. ſuper Lit. 111. Perk. ſect. 499. 500. 497. 538. Lit. ſect. 167. Dier 155. Old N. B.

Perk. ſect. 496. 528. 538.

Stat. 33 H. 8. c. 1. 34 H. 8. c. 5.

* P. 421.

deviſe two parts in three of all the land held by Knight's ſervice or any rent, &c. out of it, and all his ſocage land at his pleaſure. So that now, by theſe ſtatutes, a man that hath lands in fee-ſimple, may deviſe them in fee-ſimple, fee-tail, for life, or years, abſolutely, or conditionally, at his pleaſure. And therefore if one deviſe his land to one for life, the remainder in fee, or fee-tail to another; or deviſe his land to *B.* the remainder to the next heir male of *B.* and the heirs male of the body of ſuch heir male, or the like; theſe are good deviſes. But for the more full underſtanding of theſe things, it is to be known in the next place, 2. That this ſtatute doth not enable men to deviſe land, that are diſabled by law in reſpect of their perſons or minds, as infants, women covert, men *non ſanæ memoriæ*, or the like; nor ſuch as are diſabled in reſpect either of the nature of their land, as copyholders (for copyhold land is not deviſable)(1); or of the eſtate they have in land, as tenants in tail, or *pur autre vie* (2), or joint-tenants; for theſe can no more deviſe their land they do ſo hold, than they could before the ſtatute. But ſuch as are ſeiſed of land in common, or coparcenery, may deviſe their land as well as thoſe that are ſole ſeiſed. And if two be joint-tenants for life, the fee-ſimple to one of them; he that hath the fee-ſimple, may deviſe his fee-ſimple after the death of his companion (3). Neither doth this ſtatute enable thoſe that are ſeiſed of lands in fee, in the right of their houſes and churches, to deviſe the ſame lands: and therefore, Biſhops, Deans, Parſons, Vicars, Maſters of Hoſpitals, or the like, can no more deviſe the lands belonging to their Biſhopricks, &c. than they could before the ſtatute; but the lands they are ſeiſed of in their own right, they may deviſe like other men. 3. Hereditaments that are not of any yearly value, are ſome of them deviſable, and ſome not: for if the King grant to one and his heirs *bona & catalla felonum & fugitivorum vel utlagatorum*, fines, and amercements within ſuch a manor or village; in this caſe, the owner can neither deviſe theſe things to another, as part of the two parts, nor leave them to deſcend for a third part. And yet if one have a manor unto which a leet, waif, eſtray, or the like, is appendant or appurtenant; there, by the deviſe of the manor with the appurtenances, theſe things may paſs as incident to the manor: but if a man have an hundred, with the goods of felons, out-laws, fines, amercements, *retorna brevium*, and other ſuch caſual hereditaments within the ſame hundred, and theſe have been uſually let to farm for a rent; in this caſe, theſe things may be deviſed * or left to deſcend for a third part. 4. Such incertain franchiſes, as before, that are hereditaments of no yearly value, albeit they are not deviſable, yet may reſtrain

See the Statute Co. ſuper Lit. 111. Perk. ſect. 544. Lit. ſect. 287. Dier 210. Old N. B. 89. Perk. ſect. 500. 539. 540, 496. 497, 498.

Co. 10. 81. 3. 32. ſuper Lit. 111.

Co. 10. 81. 82. ſuper Lit. 111. Co. 3. 35. 3 o. 34.

* P. 422.

(1) A man cannot deviſe a copyhold by will at the common law, but muſt ſurrender to the uſe of his laſt will and teſtament, and in his will muſt declare his intent. *Co. Comp. Cop.* 83. —→ Copyhold lands do not paſs by the will, but by the ſurrender; for the will is only declaratory of the uſes of the ſurrender. 1 *Bulſt.* 200.

(2) But by the ſtatute 29 *Car.* 2. *c.* 3. § 12. Eſtates *pur auter vie* are deviſable by a will in writing atteſted by three witneſſes; and if ſuch eſtates are not deviſed, the ſtatute 14 *Geo.* 2. *c.* 20. § 9. directs them to be applied and diſtributed as perſonal eſtate.—See before in page 104 and note 3 thereto.

(3) See the caſe of *Weeden* v. *Baldwin*, Sir *T. Raym.* 40. ——— In *Swift* on the demiſe of *Neale* and *wife* v. *Roberts* in *B. R.* 3 *Burr.* 1488. the court held "that a will made by a joint-tenant during the continuance of the jointure, is not a good will (even as to *his ſhare* of the eſtate) under the ſtatutes of Wills in 32 & 34 *H.* 8. notwithſtanding a ſubſequent ſeverance of the jointure by a partition made after the time of making the will and before his death; unleſs there be a republication of it, after the partition."

the deviſe of a man's lands and tenements, and make it void for a third part, if they be held *in capite*; for it is not requiſite, that the thing, held by the tenure *in capite*, be deviſable: and ſuch things as may not be left to deſcend to the Lord for a third part, and to ſatisfy him his duties, may notwithſtanding be deviſable, or reſtrain the deviſe of other lands and tenements, and make it void for a third part. And therefore a reverſion upon an eſtate tail, which is dry and fruitleſs, if it be holden of the King by Knight's ſervice *in capite*, will hinder the deviſe of the third part of a man's lands and tenements: alſo an eſtate tail, of lands held *in capite*, may reſtrain the deviſe of a third part of other lands. And therefore, if ſuch lands be conveyed to one and the heirs of his body, the remainder to another, and he have other lands in ſocage; if he have any iſſue, he can deviſe but two parts of his ſocage land. And where the ſtatute ſpeaks of a remainder, it is to be intended of ſuch a remainder only, as may draw ward and marriage by the common law, and this is that remainder only, that doth hinder a deviſe. And therefore if *A.* be ſeiſed of land, in ſocage tenure; and *B.* be ſeiſed of lands in fee, held *in capite* by Knight's ſervice; and *B.* make a leaſe for life, or gift in tail, to *C.* the remainder to *A.* in tail, or in fee; in this caſe, *A.* during the eſtate for life or in tail, may deviſe all his ſocage land, notwithſtanding this remainder. But if a man make a leaſe for life or years, and after grant the reverſion for life or in tail, the remainder in fee, and after the grantee for life dieth, or donee in tail dieth without iſſue; in this caſe, this remainder which now is in point of reverſion, will reſtrain the deviſe of other lands, and make it void for a third part. 5. In all caſes where a man is reſtrained to deviſe any part of his lands held in ſocage, he muſt have lands held *in capite* at the ſame time; and therefore the time of having lands to deviſe, and holding of other lands *in capite*, and diſpoſing of the lands to be deviſed, muſt concur. And therefore if a man be ſeiſed of an acre of land in fee, held of the King in chief by Knight's ſervice, and of other two acres in fee held in ſocage, and enfeoff his younger ſon of the acre held *in capite*, and of one of the other acres, or convey it to the uſe of his wife, or for the payment of his debts, *&c.* and after purchaſe lands held in ſocage; in this caſe, he may deviſe all the new purchaſed land held in ſocage without reſtraint. So if a man be ſeiſed of lands held by Knight's ſervice *in capite* in poſſeſſion, reverſion, or remainder, and of lands held in ſocage; and, by his will in writing, doth deviſe all the ſaid lands; and after the land held *in capite* is recovered from him, or aliened by him *bona fide*; in theſe * caſes, the deviſe is good for all the land held in ſocage: and hence it is, that if the king grant land to one in fee-farm to hold in ſocage at a rent, and after grant this rent to another and his heirs, to hold *in capite*, and the grantee of the rent doth grant it to him that hath the land; in this caſe, becauſe the rent is extinct, and he cannot be ſaid to hold lands *in capite*, this ſhall not reſtrain the deviſe of any of his lands. And yet if a man hold ſome lands by Knight's ſervice *in capite*, and other lands in ſocage, and be diſſeiſed of the lands held *in capite*; he cannot deviſe all his ſocage land, but the deviſe will be void for a third part, for he is ſaid to have that land ſtill, whereof he hath the right. And albeit the ſtatute ſay, that he that hath lands held of the King

Co. 10. 81. 11. 24. 3. 30, 34, 35. Super Lit. 111. Dier 158.

* P. 423.

in capite, and other lands in ſocage, may give two parts for the advancement of his wife, payment of his debts, preferment of his children; whereby he is reſtrained to deviſe any more. And therefore, if, by act executed in his life time, he convey two parts to any ſuch uſes or intents, he cannot deviſe any more by his will, but the reſidue muſt deſcend, yet this alſo is to be intended of the land he hath at the ſame time. For if a man be ſeiſed of lands held in ſocage of the yearly value of twenty pounds *per annum*, and he hath not any land held *in capite* by Knight's ſervice, and he make his will in writing, and by it deviſe the ſocage land to one in fee, and then purchaſe land to the value of twenty ſhillings *per annum* held *in capite*, and die; this will make the deviſe void for a part of the land that is held in ſocage. But if a man, ſeiſed of land in fee of ſocage tenure, aſſure it to the uſe of his wife for her jointure, and after purchaſe lands held *in capite* by Knight's ſervice; he may deviſe two parts in three of all this *capite* land, and the King ſhall
Co. 3. 34. 11. 24. not have any thing out of or for the ſocage land. If a man ſeiſed of lands, part of which are held *in capite*, and part in ſocage, make a feoffment of the lands, held *in capite* (being two parts in three of the whole) to the uſe of him and his wife for life, with divers remainders over; in this caſe he may not, deviſe any of the ſocage land. And if a man have no ſocage land, but *capite* land only, and convey it away in fee-ſimple, keeping on reverſion to any ſuch uſe, and after purchaſe ſocage land; he
Co. 3. 32. may deviſe all the ſocage land newly purchaſed. 6. As the teſtator, enabled to deviſe by this ſtatute without reſtraint, is and muſt be one that hath the land he doth deviſe, at the time of the deviſe made, and no other land then to be an impediment to his deviſe, ſo he muſt have a ſole eſtate as well in the land he doth leave to deſcend to the heir, as in the land he doth deviſe: and therefore, if lands held *in capite* be conveyed to a man and his wife, and the heirs of their two bodies; and this man hath other lands whereof he is ſole ſeiſed, held of the King *in capite* by Knight's ſervice; in this caſe, he may not deviſe two parts of the whole, ſuppoſing * this may ſuffice for the King's third part; for he may deviſe but two parts of the reſidue; *i. e.* of that whereof he is ſole ſeiſed, either at the time of making of the will, or at the leaſt at the time of the
Co. 10. 84. death of the teſtator. 7. The eſtate of the land that is held muſt continue after the death of the tenant: otherwiſe it will be no reſtraint. And therefore, if tenant in tail be to him and the heirs males of his body, the remainder in fee to another, of lands held by Knight's ſervice *in capite*; and he is ſeiſed of other lands in ſocage in fee, and by his will in writing deviſe all the ſocage land, and die without iſſue male; in this caſe, the deviſe is good for all the ſocage land. And ſo alſo it is where the eſtate which the anceſtor had of the land held, is defeated by con-
Co. 3. 33. dition. 8. That which a man cannot diſpoſe by any act in his life-time, ſhall not be taken for any ſuch manors, *&c.* whereof a man may deviſe two parts by authority of this ſtatute at his death: and therefore in the caſe of an evident eſtate of lands between huſband and wife, where the huſband can make no diſpoſition for longer time than during the coverture, theſe lands are not to be eſteemed ſuch as are to be accounted amongſt the
Co. 10. 84. 3. 34. lands, whereof two parts in three are deviſable. 9. The tenure by Knight's ſervice muſt continue after the death of the deviſor,

* P. 424.

deviſor, otherwiſe the land ſo held will be no reſtraint. And therefore if the King grant land to one and his heirs, to hold during his life by Knight's ſervice *in capite*, and after in ſocage; or to hold during his life in ſocage, and after by Knight's ſervice: in theſe caſes, the grantee may deviſe all his land, notwithſtanding the tenure of this land. 10. The King or other Lord muſt have a full and clear yearly value of the third part left to deſcend to him, and the value is to be eſteemed as it is, and doth happen to be at the time of the death of the teſtator; for the King, or other Lord, muſt have the like or equal benefit for his third part, as the deviſee hath for the two parts, without diminution or ſubſtraction; when therefore a man will have his deviſe good for the reſidue, he muſt take care that the third part be ſo left; for if the third part be not valuable, or be charged with any rent, *&c.* or be upon any incertainty, as if it be upon a poſſibility only; as where a man and his wife be ſeiſed of a joint-eſtate tail made during the coverture, and he deviſe other lands to her on condition that ſhe ſhall waive her eſtate made during the coverture, and ſo intend that that part of his land ſhall be left for the King's part; this deviſe will not be good for the reſidue; and albeit the wife do waive the eſtate after the huſband's death, yet this will not help the matter, or make the deviſe good for that part for which it was void before: but it is not material by what tenure the third part deſcending be held: for it is held by the better opinion, that if a man be ſeiſed of 20 *l.* land held of the King *in capite*, and 10 *l.* land held of a ſubject by ſocage, and he deviſe all the *capite* land * to a ſtranger; that this is a good deviſe for the whole, and that the King ſhall be ſatisfied by the ſocage land. And if it be of the value of the third part, albeit it be but of an eſtate tail whereof the anceſtor was ſeiſed, or if it be new purchaſed land, yet it is ſufficient: and therefore, if ſome lands be given to a man, and the heirs of his body of the value of 10 *l. per annum*, and he be ſeiſed of other lands in fee-ſimple, to the value of 20 *l. per annum*, and all or part of theſe are held *in capite* by Knight's ſervice; in this caſe, he may deviſe the lands in fee-ſimple, and leave the entailed land to deſcend for a third part: and if a man be ſeiſed of ſuch land, and convey to the uſes within the ſtatute, or any of them, and after purchaſe new land, and leave that to deſcend, this is ſufficient. 11. The third part that is left to deſcend to ſatisfy the King or other Lord muſt deſcend immediately, and he muſt not ſtay for it. And therefore if a man be ſeiſed of three acres of land held by Knight's ſervice *in capite*, and make a leaſe of one acre for life, and after deviſe the other two acres; this deviſe is not good for the whole two acres, but for two parts in three thereof only: and albeit the tenant for life die afterwards, yet this will not help the matter. But if the deviſor leave a full third part immediately to deſcend in fee-ſimple or in fee-tail, he may deviſe the other two parts at his pleaſure. And if he do not leave a third part to the full, it muſt be made up and ſupplied out of the other two parts, which in caſe of the King is done by commiſſion out of the court of wards, and in caſe of a ſubject by commiſſion out of the chancery. 12. The third part left to deſcend, muſt be of as good value as either of the other two parts is at the time of the death of the teſtator, or otherwiſe the deviſe of all the reſidue will not be good, for ſo muſt it be taken out of

Co. 3. 32. 31. ſuper Lit. 111. 10. 48.

* P. 425.

Co. 3. 34.

Co. ſuper Lit. 111. 91 133. 3. 32. 30.

of the lands of the teſtator indifferently: and therefore, if a man be ſeiſed in fee of land held in chief by Knight's ſervice, and make a feoffment of the one half of it to the uſe of himſelf for life, and after to the uſe of one he doth intend to marry, and after to the uſe of another in remainder, or to any other ſuch like uſes within the ſtatute, and after he doth marry the ſame woman, and after he deviſeth the other moiety to his wife, children, or any other; in this caſe, albeit the wife's eſtate have precedency, yet the King ſhall have the third part of both the moieties equally. So if one be ſeiſed of gavelkind land held *in capite*, and, his ſon being dead, deviſe part of it to one of his grandchildren, and part of it to another, and part to a third in tail; in this caſe, the King's third part ſhall come of all the three parts equally, and accordingly the deviſe will be void for ſo much to every one of them. So if one hold three ſeveral manors of three ſeveral lords; he cannot deviſe two of theſe manors leaving a third to deſcend; but he may deviſe two parts of every of the three manors, and a third part of each manor muſt * deſcend to each Lord, for there muſt be an equality in theſe things. For further illuſtration of which things, the examples following are to be heeded.

* P. 426.

Co. 3. Butlers and Bakers caſe. *W. B.* being ſeiſed of the manor of *Thoby in capite*, and of lands in *Fobbing* held in ſocage in fee, and he and his wife being ſeiſed of the manor of *Hinton*, held *in capite*, to them and the heirs of their two bodies begotten, by an eſtate made to them during the coverture, for the jointure of the wife, the reverſion to *W.* in fee, and *Thoby* doth amount to the value of two parts, and *Hinton* and *Fobbing* to a third part, and *W. B.* by his will in writing, doth deviſe *Thoby* to his wife for life, upon condition that ſhe ſhall not take her former jointure, with divers remainders over, and die, and ſhe refuſed her former jointure in *Hinton*; in this caſe, it was adjudged that the deviſe was not good for the whole manor of *Thoby*, and that the manor of *Hinton* was not a ſufficient third part to deſcend.

Co. 10. 78. Leonard Leoveis caſe. Co. 11. 24. *L. L.* being ſeiſed of the manors of *Affaland*, *Heauton*, *Rillaton*, *Pengelley*, *Willeſworthy*, and *Triveſquite* (the laſt only held *in capite*) in fee, and having iſſue *Thomas* his eldeſt ſon, *William*, *Humphrey*, and *Richard*, younger ſons, which *Richard* had iſſue *Leonard*, makes a feoffment of theſe manors to divers uſes, *viz.* of the manors of *R. P. W.* and *A.* to the uſe of the feoffor for life; and after to the uſe of ſuch perſon as he ſhould appoint by his laſt will, and after to the uſe of *W.* his ſecond ſon in tail, and after to his other ſons in tail, and after to the uſe of the feoffor and his wife in tail, and after to the uſe of the feoffor and his heirs for ever; and of the manor of *H.* to ſuch like uſes; and of the manor of *T.* alſo to ſuch like uſes; and the ſame uſes were with power of revocation: and after the feoffor purchaſed eight acres of other land held in ſocage, and after did revoke the uſes of the manors of *R. P. W.* and *A.* and after deviſed ſome of the ſaid manors (excepting ſome pieces) and the ſaid eight acres of land to his eldeſt ſon and the heirs males of his body for five hundred years on certain conditions, and if he die without iſſue, that it ſhall go to *William*, *&c.* and afterwards he die ſeiſed of the ſaid eight acres of land, and the lands deviſed by the will at the time of the death of the teſtator were of the yearly value of 24*l.* 14*s.* 10*d.* *per annum*, *& non ultra*, and the lands whereof the feoffment was made, and not revoked, were at the time of the death of the teſtator of the value of

55 *l.* 6 *s.* 8 *d.* in this caſe, it was adjudged that the deviſe of the eight acres newly purchaſed was void at leaſt for a third part, and reſtrained by the reverſion in fee expectant upon the eſtate tail made to the younger ſon of the manor held *in capite*. And it was reſolved, that if a man be ſeiſed of three acres of equal yearly value, one of them held of the King by Knight's ſervice *in capite*, and have iſſue two ſons, and give the acre ſo held, and another of the acres, to his younger ſon, whereby he hath ſo executed * his power by the ſtatute, that he cannot deviſe by his will any part of the third acre; and after he purchaſe three acres of equal value held in ſocage; that in this caſe, becauſe he hath the reverſion in fee upon the eſtate tail made to the younger ſon, he can deviſe no more but two parts of the ſaid land ſo newly purchaſed: but if the reverſion be gone before the purchaſe, he may deviſe the whole. But if a man be ſeiſed of lands in fee, part of which are held of the King *in capite* by Knight's ſervice, and he convey two parts of it unto any of his ſons, or to the uſe of his wife for life, or in tail; in this caſe, albeit he may not deviſe any part of the reſidue, yet he may by his will deviſe the reverſion of the two parts. And in caſe, where he hath not conveyed the full two parts, he may deviſe ſo much as to make up that he hath conveyed full two parts: and it was further reſolved in the ſame *Leonard Loveis* caſe, That whereas the ſtatute ſaith, all perſons, *&c.* having, *&c.* any manors, *&c.* in poſſeſſion, reverſion, or remainder, *&c.* and the feoffor *L. L.* in the caſe before had a remainder in tail expectant upon the eſtates in tail limited to the ſons; that this remainder was not within the ſtatute, nor would have reſtrained the deviſe, but for the reverſion in fee afterwards. *A. B.* being ſeiſed in fee of the manor of *Gracediu* held *in capite*, and of the value of thirty pounds *per annum*, and of the manor of *Normanton* held *in capite*, of the value of 18 *l. per annum*, in conſideration of a marriage with *M.* did covenant to ſtand ſeiſed of the manor of *G.* to the uſe of himſelf and the heirs males of his body, on the body of the ſaid *M.* and after to the uſe of *W. B.* his brother, and the heirs males of his body, and after to the uſe of another brother in tail, and after to the uſe of his own right heirs, and of the manor of *N.* to the uſe of himſelf and *M.* he is to marry, and the heirs of his body, and after the remainders as before of the other manor; and after the marriage is had *A. B.* doth purchaſe other lands held in ſocage of the value of 3 *l. per annum*, and then deviſed the ſame new purchaſed lands; in this caſe, it was adjudged that the deviſe was void for a third part of the ſocage land, in reſpect of the reverſion dependant upon the eſtate tail, and yet that it was a good deviſe for two parts of the new purchaſed land, albeit he had executed his power and given more than two parts to the uſe of his wife. And in theſe caſes. where a man hath land held *in capite*, and other land, and he convey the land held *in capite* to any of the uſes within the ſtatute, as to his younger children or the like, or convey it with power of revocation only, ſo that he hath power of the land ſtill, and after he purchaſe land held in ſocage; in this caſe, it ſeems he may deviſe all the land newly purchaſed, as if the land were conveyed without ſuch power of revocation. *A.* being ſeiſed of land in fee * held of the King *in capite*, made a feoffment of two parts of it to the uſe of his wife for her life, for her jointure, and after made a feoffment of the third part

* P. 427.

* P. 428.

Co. 6. 16. ſuper Lit. 111.

Co. 11. 23. Hen. Harpur's caſe.

Co. 10. 83.

Co. 6. 17. Sir Edward Clere's caſe.

part to the uſe of ſuch perſon or perſons, and of ſuch eſtate and eſtates as he ſhall limit and appoint by his laſt will and teſtament in writing; and afterwards he did by his laſt will in writing deviſe this third part to one in fee; in this caſe, it was reſolved that the deviſe was good for the whole third part. And yet if a man make a feoffment in fee of land held *in capite* to the uſe of his laſt will, albeit the deviſe of the land be with reference to the feoffment, yet it is void for a third part. *E. B.* being ſeiſed of ſix manors, the one in fee, and the reſt in tail with the reverſion expectant to him and his heirs, and hath iſſue *T. B.* divers of which manors are held of the King *in capite* by Knight's ſervice, and every of them of equal yearly value, by his laſt will in writing did deviſe all the ſaid manors to divers perſons and their heirs, for payment of his debts, and advancement of his children, and then died, and the eſtate in tail that deſcended to his iſſue was more than a third part of all; in this caſe, it was reſolved that the deviſe was good for two parts of the reverſions, and for the entire manor in poſſeſſion, and not void for a third part of the manor in poſſeſſion, and for all the reverſions in fee. A man being ſeiſed in fee of Gavelkind land in *Kent*, part whereof is held of the King *in capite*, and part of common perſons in ſocage, hath iſſue *A.* who hath iſſue *B. C.* and *D.* and he deviſeth ſome of theſe lands to *B.* and ſome to *C.* and ſome to *D.* his grand-children in tail; in this caſe, the deviſe is void for a third part of the whole, as well for the land held in ſocage, as the land held *in capite*. And yet if in this caſe no will be made, the King ſhall have but a third part of that which doth deſcend to the eldeſt ſon the heir at the common law, and not the third part of that which doth deſcend to the younger ſons by cuſtom. And if lands deviſable by cuſtom come into the King's hands, and he grant them to hold of him *in capite*, and the patentee deviſe them to the uſe of his wife, children, or for payment of his debts, *&c.* in this caſe, the deviſe is void for a third part (1). And here note, that in all the caſes before, where a man is reſtrained to deviſe a third part of his land, if he deviſe the whole, the deviſe is good notwithſtanding for ſo much as he hath power to deviſe. And as touching the thing deviſed, it is further to be known; 3. That a man muſt have right to and poſſeſſion of the land he deviſeth, or elſe the deviſe is not good. And therefore if a diſſeiſor deviſe the land he hath gotten by diſſeiſin; this deviſe as to the deviſee is void. And if a man be diſſeiſed of his land, ſo that he hath nothing but a right thereof left, and then he deviſe this right, or deviſe the land, this deviſe is void (2). And if one contract

Co. 10. 18. Trin 34. Eliz. Bedinfield's caſe.

Co. Rep. Stamf. Per. 8.

Plow. 485.

Deviſe of a right to land, or of land that is another man's.

Nevil's caſe.

(1) By the ſtatute 12 *Car.* 2. *c.* 24. "for taking away the court of wards and liveries, and tenures *in* "*capite*, and by Knight's ſervice, and purveyance, and for ſettling a revenue upon his Majeſty in lieu "thereof," all tenures by Knight's ſervice of the King, or of any other perſon, and by Knight's ſervice *in capite*, and by ſocage *in capite* of the King, and the fruit, and conſequents thereof are taken away and turned into free and common ſocage: and it is thereby enacted, that all tenures thereafter to be created by the King, his heirs or ſucceſſors, upon any grants of any manors, lands, or hereditaments, of any eſtate of inheritance at the common law ſhall be in free and common ſocage, and not by Knight's ſervice or *in capite*—but that act does not extend to take away or alter tenures in *Frank-almoign*; nor to change any tenure by copy of court roll, or any of the ſervices incident thereunto; nor to take away the honorary ſervices of Grant Serjeanty, other than of wardſhip, marriage, and other charges incident to tenure by Knight's ſervice.— —Mr. Juſtice *Blackſtone* treating of this ſtatute (in 2 vol. of his *Comm.* p. 77.) deems it "a greater acquiſition to the civil property of this King"dom than even *Magna carta* itſelf; ſince that only pruned the luxuries that had grown out of the military "tenures, and thereby preſerved them in vigour; but the ſtatute of King *Charles* extirpated the whole, and "demoliſhed both root and branches."

(2) But if the diſſeiſee re-enters, the deviſe ſhall be good; for he was ſeiſed *ab initio*. 1 *Salk.* 237.—*Bunter* v. *Coke*.

for land, and pay his money for it, but * hath no assurance of the land, and he devise this land to another; this cannot be a good devise of the land, but perhaps the devisee may in a court of equity compel him that hath received the money to assure and settle the land according to the devise (1). And if one devise another man's land, this devise is void; but if he, after the devise made, purchase this land, now is the devise good (2). If a man bargain and sell land to me on condition to re-enter, if he pay me ten pounds, and I covenant that I will not take the profits until default of payment, and he make a lease of six years of it to another, and after break the condition; in this case, I may devise this land, and the devise will be good.

* P. 429.

Plow. 344. Fitz. Devise 7.

Adjudged Powsley & Blakeman's case.

Devise of rent, common, seigniory or the like.

14. A seigniory, rent, or the like thing is devisable as land is, and will pass without the attornment of the tenant. The like law is of a reversion also. And a man may devise a rent *de novo* issuing out of land, or a rent issuing out of land that is in *esse* before. And therefore if a man make a lease for life, or years, rendring rent, the lessor may devise this rent. So if a rent be granted to one and his heirs, the grantee may devise this rent. So a man that is seised of land in fee may devise any rent out of it at his pleasure. And therefore if a man that holdeth his land by Knight's service in chief, by his will devise any rent, common, or other profit out of it; this devise is good, and that albeit the rent or profit doth amount to the value of the whole land; as if one had three acres of land worth three shillings by the year, and he devise three shillings rent out of it, this is a good devise of the whole rent; but in this case, the rent shall issue out of two parts of the land, and a third part shall be free and not charged with it, but he may charge two parts in three parts of such lands at his pleasure. And so also it is if a man have lands holden by Knight's service and not *in capite*, and other lands in socage, he may charge two parts of the Knight's service land, and all his socage land at his pleasure. And if a man have lands held in socage, and no lands held *in capite*, or by Knight's service, he may devise what rent he will out of it. But a man cannot devise a rent, common, or any such thing out of another man's land that is none of his own, nor out of that he hath not. And therefore if one devise 10 *l.* out of his manor of *Dale*, when in truth he hath no such manor, this devise is void. If a rent be granted to me for the life of *I. S.*; it seems I may not devise this rent, but that the terre-tenant shall hold it as an occupant (3).

Perk sect. 533. Lit. sect. 585, 586. Dier 253. 140 5. 52. F.N.B. 121. Co. super Lit. 111. 8. 83. 3. 33.

Occupant.

Dier 252.

Devise of houses, doors, glass wainscot, &c.

15. Where a man is seised of a house in fee, and may devise the house itself, there it seeems he may devise the doors, windows, wainscot, or the like incidents of the house. And where a man may devise the land itself, it seems he may devise the trees or grass growing upon the land, *quando licet id quod majus, videtur & licere id quod minus.* But where the land itself is not devisable, there such things incident or annexed to, * or growing or being upon it, are not devisable. And therefore a tenant in tail, for life, or years, of land

Co. 4. 63. Perk. sect. 512. 518. Co. 11. Rich. Liford's case. Kelw. 88.

* P. 430.

(1) If after articles are entred into for a purchase, and before a conveyance executed, the purchaser devises the land, it shall be good in equity; for the vendor is considered as seised in trust for the purchaser, who is deemed the real owner of the land, and is therefore allowed in equity to dispose of it. 1 *Chan. Ca.* 39. — — and if the articles are entered into in the name of an agent or a trustee for the purchaser, the devise will be good, an equitable interest being as well devisable as a legal estate.—*Greenhill* v. *Greenhill*, 2 *Vern.* 679.

(2) See fully in what cases lands, acquired after the time of making the will, shall be said to pass; in *Vin. Abr.* Devise (I. 4.)

(3) See note 3 to page 104, and the several references therein.

may

may not deviſe the houſes, or windows, doors or wainſcot of houſes, or trees, or graſs being or growing thereupon, but this deviſe is void. 16. Where a man hath a uſe that is not executed by the ſtatute of uſes, but remains at the common law, he may deviſe it as he may any other thing: and therefore if one be poſſeſſed of a term of years, and grant it over to another to the uſe of the grantor, he may diſpoſe of this uſe by his will, for it is in the nature of a chattel. But if a man have ſuch uſe in joint-tenancy, he cannot deviſe it. 17. All manner of goods and chattels real and perſonal may be deviſed by teſtament. And therefore leaſes for years of lands, grants for years of rent, common, or the like, wardſhips of the bodies and lands of heirs of tenants by tenure *in capite*, and by Knight's ſervice (1), cattle, as oxen, ſheep, horſes, *&c.* gold, ſilver, money, plate, houſhold ſtuff, as beds, pots, pans, platters, *&c.* corn, wool, and implements of huſbandry, may be deviſed by will; and not only thoſe a man hath at the time of the deviſe, but thoſe a man is to have or may have afterwards. And therefore it is held, that a man may give his corn that ſhall grow in ſuch a ground the next year after his death, or the wool or lambs his flock of ſheep ſhall yield the next year after his death; and that theſe deviſes are good: but if in this caſe there ſhall be no ſuch corn growing in that ground, or any lambs or wool ariſing out of his flock that year, the legacy is fruitleſs. And yet if the teſtator deviſe to *I. S.* twenty quarters of corn, or twenty lambs, and doth will that the ſame ſhall be paid out of his corn that ſhall grow, or out of his flock the next year, and there be not ſo much corn, or not ſo many lambs, or not any at all growing or ariſing, yet this is a good deviſe, and the things muſt be paid. In like manner if a man give to *I. S.* a horſe, or a yoke of oxen; in this caſe, albeit the teſtator have neither horſe nor yoke of oxen, yet the deviſe is good and muſt be performed. 18. Things in action, as debts, and the like, albeit they be not grantable by deed in the life-time of the party, yet are they deviſable by will. And therefore if the teſtator doth by his will give any debt due to him on an obligation, or on a contract, or the like, this deviſe is good. And the thing deviſed may be had thus; the teſtator may, if he will, make the legatary executor as to that debt, or if he do not, the legatary may ſue the executor in the ſpiritual court, or in ſome court of equity, and thereby compel the executor either to recover it himſelf, and ſo to pay it to the legatary, or to give the legatary power to ſue for and recover it himſelf in the executor's name. But if it be ſuch a cauſe of action, as is altogether uncertain, as where a man may have an action againſt another, for taking away his goods, or to compel him to make an account, or the like, this is ſuch a cauſe of action as is not deviſable. * And yet poſſibilities and incertainties are in divers caſes deviſable. And therefore if one have money to be paid him on a mortgage, he may deviſe this money when it comes; as if I enfeoff a ſtranger of land, upon condition that if he do not pay me twenty pounds ſuch a day, that I may re-enter, in this caſe I may deviſe this twenty pounds if it be paid, and the deviſe is good, albeit it be made before the day of payment come.

Perk. ſect. 500. See Uſes. — Deviſe of a uſe.

Swin. part 3. ſect. 5. Perk. ſect. 511, 525. — Deviſe of goods and chattels.

Deviſe of debts and things in action, poſſibilities and incertainties.

Perk. ſect. 527. Bro. ſect. 437. Dier 272. Plow. 520. — * P. 431.

(1) See the ſtatute 12 *Car.* 2. *c.* 24. mentioned before.

And if a man be poſſeſſed of a term of years, and deviſe all the reſidue of that term of years that ſhall be to come at the time of his death; this deviſe is good, and yet ſuch a grant by deed is void. But a meer poſſibility, and a thing altogether incertain is no more deviſable by will, than it is grantable by deed. 19. Emblements, *i. e.* the corn that is ſown and growing upon a man's ground at the time of his death, and which himſelf ſhould have reaped if he had lived to the harveſt, (as in moſt caſes he ſhall where he doth ſow it) are deviſable. And therefore if a man have land in fee-ſimple, fee-tail, for life, or years, and ſow it with corn; he may deviſe the corn at his death to whom he pleaſeth (1). And yet if leſſee for years ſow his land ſo little a while before his term expire, that it cannot be ripe before the end of the term, and he die, it ſeems he cannot deviſe this corn, for if he had lived he could not have reaped it after the end of the term. 20. Obligations, counterparts of leaſes, and ſuch like things, alſo are deviſable; but in this caſe, the deviſee cannot ſue upon the obligation in his own name, nor enter for the condition broken upon the leaſe if there be cauſe; but he may cancel, give, ſell, or deliver up the obligation, or counterpart to the obligor, or leſſee. And finally whatſoever ſhall come to the executor after the death of the teſtator in the right of his executorſhip, may be deviſed by the laſt will and teſtament of the teſtator. 21. The goods and chattels that a man hath jointly with another are not deviſable. And therefore if there be two joint-tenants of goods or chattels, as where ſuch things are given to two, or two do buy ſuch things together, and one of them deviſe his part of the things to a ſtranger; this deviſe is void (2). Inſomuch that if in this caſe the teſtator make the other joint-tenant his executor, the will as to this is void, and he ſhall not be charged as executor for thoſe goods, but he ſhall have them altogether by right of ſurvivorſhip. 22. The goods and chattels that a man hath in another's right are not deviſable; and therefore an executor or adminiſtrator cannot deviſe the goods and chattels he hath as executor or adminiſtrator, for ſuch a deviſe is void. Howbeit the executor may appoint an executor of the goods of the firſt teſtator, which the adminiſtrator cannot do; and of the profits that do ariſe by the goods and chattels the executor or adminiſtrator hath during the time of his adminiſtration, he may make diſpoſition. The goods and chattels belonging to colleges or hoſpitals may not be deviſed by the teſtaments of the * maſters or governors thereof; nor the goods and chattels belonging to other corporations, by the mayors, bailiffs, or heads thereof. And the goods and chattels that churchwardens have in the right of the church are not deviſable. All the chattels real that a man hath in the right of his wife by her means, and all the obligations that are made to her alone before or during the time of the coverture, and the chattels real or

Child's caſe. 17 Ja. B. R.

Deviſe of emblements.

Perk. ſect. 520, 521, &c. See in Grant.

Deviſe of obligations. Counterparts of leaſes, &c.

Perk. ſect. 527.

Deviſe of the things a man hath in jointure with another.

Perk. ſect. 526. Lit. ſect. 287. Doct. & St. 167.

Deviſe of the things a man hath in another's right.

Plow. 525. Bro. Adminiſtrator 7. Fitz. Adm. 3.

* P. 432.

Doct. & St. lib. 2. c. 35. Perk. ſect. 496, 498, 499, 560. Doct. & St. c. 7.

Huſband and wife.

(1) As to the doctrine of emblements, ſee the books referred to in the note to *p.* 243.—and poſt *numb.* 25.—and more fully who may deviſe them, in *Vin. Abr.* Deviſe (I. 5.)

(2) But an exception muſt be made of the goods and chattels of merchants or traders; for the wares, merchandizes, debts, or duties, which they have as joint-merchants, ſhall not ſurvive, but ſhall go to the executors of the deceaſed, *per legem mercatoriam*, which is part of the law of this realm, for the advancement of trade and commerce, which is *pro bono publico*; for the rule is that *jus accreſcendi inter mercaturas pro beneficio commercii locum non habet.*—Co. Lit. 182. a.—See further *Vin. Abr.* Joint-tenants (B).—*Bac. Abr.* Joint-tenants, &c. (C).

perſonal

personal that his wife hath as executrix to any other, are not devisable by the testament of the husband (1). But all the chattels personal that a man hath by his wife which she hath in her own right, and the debts due upon obligations made to the husband and wife both during the coverture, are devisable by the testament of the husband. 23. Such things as are annexed, and incident to a freehold or inheritance, so that they cannot be severed from it by him that hath the property of them, as wainscot, and glass to houses, and the like, are not devisable, but in such cases where the thing itself to which it is annexed is devisable. 24. The goods and chattels that are another man's are not devisable; and therefore if a man give another man's horse, it is a void devise. So if one devise the things that by special custom of some places, as the heir-looms, do belong to the heir, this devise is void; for they are not devisable from him. 25. If a bishop have a ward belonging to his bishoprick fallen, he may devise it; but if a church of his become void in his life-time, he cannot devise the presentation. If a parson of a church have the advowson in fee, and he devise that his executors two or three of them shall present at the next avoidance; this is a good devise. 26. All these things before that are devisable, when they are devised must be named, and devised either by their proper name, or otherwise described by some other matter whereby the mind of the testator may be known and discerned; for if he err and mistake in the name or substance of the thing devised, or it be so incertainly devised and described that it cannot be perceived what he intendeth, the devise is void. And therefore if one devise a piece of ground by the name of a Messuage, except it be so called, the devise is void. And yet by the devise of the use, profit, or occupation of land, the land itself is well devised; and by the devise of land itself, the reversion thereof may be devised. But if one intending to devise a horse, doth devise an ox; or meaning to give gold, doth give apparel; these legacies are void, unless his meaning may appear by some circumstance to be otherwise; as if a man have but one horse, and he be called *Arundel*, and he devise his horse *Bucephal*; this legacy is good enough. And if a man give all his money in such a chest, when in truth there is no money in that chest; or give to another the ten pounds which *I. S.* doth owe him, when in truth *I. S.* doth not owe any such money; this devise is void. And yet if the devise be thus, *viz.* I give to *A. B.* ten pounds and * I will that the same be paid of the money I have in such a chest, or of the money which such a man doth owe me; in this case the devise is good, albeit there be not any money in the chest or owing: and if one give ten pounds remaining in such a chest, whereas in truth there is but five pounds in the chest; in this case, the legacy is good for the five pounds. But error and mistake in the quantity and quality of the thing devised, when the same for the substance of it is certain, doth not hurt: and therefore, if the testator, meaning to give the fourth part of his goods, give the

Perk. sect. 526. Kelw. 88. See before.

Plow. Grantham's case, Co. super Lit. 185, 308.

Trin. 33 Ja. Curia B. R.

Swin. part. 7. c. 5. Plow. 525. Perk. sect. 500.

Devise of things that are incident and annexed to some other thing.

Devise of things that are not the devisors, or belong not unto his executor.

Devise of a presentation to a church.

Mistake or error in the thing devised.

* P. 433.

(1) A man may sell or dispose of *chattels* real which he hath in right of his wife; and if he does not do so and survives his wife, they become absolutely his own; but if he dies before his wife without having made any disposition, he cannot dispose of them by will.—*Choses in action*, which a man hath in right of his wife, he may reduce into possession by receiving or recovering them at law; and if he does so they become absolutely his own, and he may bequeath them by will; but if he dies before his wife without having received or recovered them, they shall survive to the wife.—*Co. Lit.* 300. a.—351.—See more fully in 2 *Bl. Com.* 433.—*Bac. Abr.* Executors. (H. 4.)

one half; or meaning to give but fifty pounds, give one hundred pounds; or *è converſo*, meaning to give a greater, doth give a leſs quantity or ſum; in theſe caſes, the legacy is good, and the legatary ſhall have as much as the teſtator did mean. If a man give his white horſe, when in truth he hath but one horſe and that is black; this is a good deviſe of this horſe: and if the thing deviſed be under ſuch general words that the mind of the teſtator cannot be known by it, the deviſe is void; and therefore, if the teſtator ſay, I do bequeath ſomething, or I bequeath a ſubſtance, or I bequeath a body, or I bequeath, or the like; theſe deviſes are void for incertainty: ſo if he ſay, I do give lands, or I do give goods; theſe deviſes are void. And yet if the teſtator give a horſe, an ox, a gold chain, or the like, indefinitely; in theſe caſes, the deviſe is good, albeit he have no ſuch thing. But if one deviſe thus, I give lead, money, wheat, oil, or the like, and ſay not how much, or what quantity; this legacy is void for incertainty, or at leaſt the executor may deliver what quantity thereof he will, and this ſhall ſatisfy the legacy. 7. As touching the terms of a deviſe it muſt be known, that if one deviſe any thing to wicked ends, or upon wicked conditions, as to the end, that the deviſee ſhall kill a man, or becauſe he hath killed a man, or the like; theſe deviſes are void, in like manner as it is when the cauſe or motive is falſe, as becauſe one is my couſin, or hath lent me money, I deviſe to him twenty pounds; and he is not my couſin, or did not lend me money; theſe deviſes are void. And as touching the reſt of the properties of a good deviſe, ſee them before in the properties of a good teſtament: and here by the way, be adviſed if thou haſt land to ſettle, rather to do it by act executed by advice of learned counſel in thy life and health-time, and therein add ſuch conditions and proviſoes of revocation and otherwiſe as thou wilt; or if thou will do it by will, then do it in thy perfect memory and by learned advice: let the will be indented and of two parts, and leave one part with a friend, that it be not ſuppreſſed after thy death (r); let there be credible witneſſes to the publication thereof, and let their names be ſubſcribed to it: let the whole will be written with one hand and in one piece of paper or parchment, for fear of alteration, addition, or diminution: let * the hand and ſeal of the deviſor be ſet to it: and if it be in ſeveral parts, let his hand and ſeal and the hands of the witneſſes be to every part; if there be any raſing or interlining, let there be a *memorandum* of it. And if thou make any revocation of thy will, do it by good advice and by writing; *Vox audita perit, litera ſcripta manet* (2).

Incertainty in the thing deviſed.

Swinb. part. 7. cap. 10.

Seventhly, in reſpect of the tenures and conditions, cauſes and ends of the deviſe.

Swinb. 289.

A caveat for making of teſtaments.

Co. 3. 36.

* P. 434.

8. The expoſition of teſtaments and deviſes, and how they ſhall be conſtrued and taken. Deviſes of land. Firſt, in reſpect of the perſon that is to take by the deviſe; and what, when, and how he ſhall ſo take by the deviſe.

The general rules for the expoſition of wills are theſe; that they muſt have a favourable and benign interpretation; and as near to the mind and intent of the teſtator as may be; and yet ſo withall, as his intent may ſtand with the rules of law, and be not repugnant thereunto. It is ſaid to be therefore a maxim of law, *Quod ultima voluntas teſtatoris perimplenda eſt ſecundum veram intentionem ſuam*, according to theſe verſes:

Sed legum ſervanda fides; ſuprema voluntas
Quod mandat fierique jubet, parere neceſſe eſt.

Plow. 540. Co. ſuper Lit. 322.

Where there is a duplicate of the will, and the teſtator cancells that part which is in his own cuſtody, it is an effectual cancelling of the will, altho' the other part remains whole and uncancelled.—2 *Vern.* 742, *Onions* v. *Tyrer*.—1 *Pr. Wms.* 345. S. C.

(2) See the notes and references to 395 and 396 as to Revocations.

Terms of the law. tit. Deviſe. Co. ſuper Lit. 25. Plow. 414.

If a deviſe be made of land to *I. S.* and the heirs male of his body; by this deviſe the ſons and not the daughters of *I. S.* ſhall have the land. And if a deviſe be made of land to *I. S.* and the heirs females of his body; by this deviſe the daughters and not the ſons of *I. S.* ſhall have the land. And yet it hath been ſaid in theſe caſes, that if, in the firſt caſe, the deviſee have iſſue a daughter, who hath iſſue a ſon; or, in the laſt caſe, hath iſſue a ſon who hath iſſue a daughter; that this ſon and daughter ſhall take by this deviſe in theſe caſes; but it ſeems the law is otherwiſe.

27 H. 8. 17.

If a deviſe be made of land to *I. S.* and his heirs male; by this deviſe *I. S.* hath an eſtate tail: but otherwiſe it is of ſuch a limitation by deed; for if one by deed give land to another and his heirs male; by this the donee hath a fee-ſimple, and his heirs general ſhall have it.

Co. ſuper Lit. 27.

If a deviſe be of land to *I. S.* and to the eldeſt heirs females of his body; by this deviſe all his daughters, and not one of them only, ſhall take it: So if one deviſe gavelkind-land to a man and his eldeſt heirs; this doth not alter the cuſtom, but by this all the ſons ſhall take.

Fitz. Deviſe 2.

If a man deviſe his land to his wife for life, the remainder to his ſon and the heirs male of his body engendred, and for default of ſuch iſſue the remainder to his next heir male, and the heirs male of the body of that heir male, and after his ſon die without iſſue, (living his wife) and the deviſor hath iſſue a daughter who hath iſſue a ſon; in this caſe, and by this deviſe, it ſeems the daughter, and not her ſon, ſhall have the land, and that in fee-ſimple.

Trin. 9. El. Adjudged Curteis caſe.

If a man deviſe his land to his wife for life, and after to his own right heirs male, and he hath iſſue three daughters, and after his death one of them hath a ſon; in this caſe, and by this deviſe * the next collateral heir male of the deviſor, and not the ſon of the daughter, ſhall have the land. * P. 435.

Dier 122.

If a man have iſſue two ſons and a daughter, and deviſe his land to his wife for ten years, the remainder to his younger ſon and his heirs, and if either of the ſaid two ſons die without iſſue of their bodies, the remainder to the daughter and her heirs, and the younger ſon die in the life-time of the father, and after the father die; in this caſe, and by this deviſe, the daughter hath a good remainder, but it ſeems the elder ſon hath firſt an eſtate tail by the intent of the deviſor.

Dier 330.

If a man deviſe ſome land to *A.* his eldeſt daughter and her heirs, and if ſhe die without iſſue, to *T.* his youngeſt daughter and her heirs; and if ſhe die within ſixteen years, that *A.* ſhall have her part to her and her heirs; and if *A.* marry ſuch a one, that *T.* ſhall have her part to her and her heirs; and if *T.* die having no iſſue, that all her part ſhall go to *M.* and *E.* his nieces; and if *A.* die without iſſue, that *T.* ſhall have her part to her and her heirs; and *T.* after ſixteen years, doth die without iſſue; in this caſe, the nieces *M.* and *E.* and not *A.* ſhall have her part that is dead.

Perk. ſect. 566, 567.

If land be deviſed to *A.* for life, the remainder to a monk for life, the remainder to *I. S.* in fee; by this deviſe he in the remainder in fee ſhall take preſently after the firſt eſtate for life ended; and if the deviſe be to a monk for life, the remainder to *I. S.* in fee; by this *I. S.* ſhall take preſently.

Dier 326.

If a man deviſe his land to a woman and her brother, and the heirs of either of their two bodies, and for default of iſſue of the ſaid woman and her brother, the remainder to the right

heirs of the deviſor, and after the death of the deviſor, the brother dieth without iſſue, and the ſiſter hath iſſue and dieth; in this caſe, and by this deviſe, her iſſue ſhall have a moiety and no more of the land.

If one deviſe two parts of his land to his four younger ſons in tail, and that if the infant in the womb of his wife be a ſon, that he ſhall have the fifth part as co-heir with the four, and if his five ſons die without iſſue, that the two parts ſhall revert, and then the deviſor dieth, and after a ſon is born, and after he and three of the other ſons die; in this caſe and by this deviſe, the infant ſhall not take any thing, becauſe he is incapable, and the two parts ſhall not revert to the heir until the five ſons be dead without iſſue (1). Dier 304.

If one deviſe the manor of *Dale* to the eldeſt ſon of *I. S.* in fee, and the manor of *Sale* to *I. D.* for life, the remainder to ſuch of the children of *I. S.* as ſhall be then living, and ſhall have the manor of *Dale*, and the eldeſt ſon of *I. S.* after the teſtator's death doth ſell the manor of *Dale*, and after *I. D.* dieth; in * this caſe, and by this deviſe, none of the children of *I. S.* ſhall have the manor of *Dale*, but it ſhall go to the heirs of the deviſor. Adjudged C. B. M. 36. 37. Eliz. Brown's caſe.

* P. 436.

If one deviſe his land to the children of *I. S.* by this deviſe the children that *I. S.* hath at the time of the deviſe, or at the moſt the children that *I. S.* hath at the time of the death of the teſtator, and not any of them that ſhall be born after his death, ſhall take.

If one have two daughters by divers women, and deviſe a moiety of his land to his wife for ſeven years, and that the elder daughter ſhall enter into the other moiety at her day of marriage, and if his wife be with child of a daughter, that then ſhe ſhall have an equal portion with the other ſiſter, and the deviſor dieth, and the wife doth enter and hath not a daughter, and then the elder daughter doth take a huſband, and enters upon a moiety, the younger daughter dies without iſſue, and the ſeven years expire; in this caſe, and by this deviſe, the collateral heir of the younger daughter ſhall have the moiety of the whole, and not the moiety of a moiety only, and that by deſcent. Dier 343.

Next of blood.

If a man have iſſue *B. C.* and *D.* ſons, and he deviſe his land to *D.* his ſon, the remainder *proximo de ſanguine*, or to the next of blood of the teſtator; in this caſe and by this deviſe, *B.* ſhall take after the death of *D.* as the next of blood. In like manner if the teſtator have four daughters, and he deviſe his land to the youngeſt in tail, the remainder to the next of blood: by this deviſe the eldeſt daughter, and not all the reſt, ſhall have the land. And if the teſtator have iſſue *B.* his elder ſon and *C.* his younger ſon, and *B.* have iſſue *D.* his ſon, and *B.* is attainted and dieth; and the teſtator deviſeth his land to *I. S.* for life, the remainder to the next of blood of the teſtator; by this deviſe *D.* and not *C.* ſhall have the land. Curia B. R. Mic. 20 Jac.

If *A.* have iſſue *B.* and *C.* ſons, and *D.* a daughter, and deviſe his land to *C.* for life, and after that it ſhall remain to the next of blood to his children, or to the next heirs of the blood of his children, and *C.* and *B.* die without iſſue, and *D.* hath iſſue a daughter; in this caſe, and by this deviſe, the heirs of *A.* ſhall not take, but the next of blood to the children of *A.* which is the daughter of *D.* and his children themſelves are Bro. Diſcent pl. 19. 8. Aſſ. pl. 6.

(1) See the note to page 399, and the books therein referred to, touching a *deviſe* to an infant *en ventre ſa mere*.

excluded

excluded; and if the ſons have any iſſues living, they ſhall take with her by this deviſe.

Adjudged M. 20 Jac. Perin verſus Peaſe, B. R.

If the teſtator have iſſue by *A.* his firſt wife, three daughters, *Joan*, *Elizabeth*, and *Anne*; and by *B.* his ſecond wife, *Alice* and *Elizabeth*; and by *C.* his third wife, *William* a ſon, and three daughters, *Mary*, *Katherine*, and *Joan*; and he deviſe his land to *Joan* his youngeſt daughter for life, paying 13*s.* 4*d.* to the ſon, and after her death to the ſon and the heirs of his body, and after his death * without iſſue to *Elizabeth* the daughter of the ſecond wife, and *Mary* the daughter of the third wife for their lives; the remainder (in Latin) to the next of the blood of the deviſor for ever, and the elder *Joan* hath iſſue *I. P.* and dieth, the ſon dieth without iſſue; the younger *Joan* hath iſſue and dieth; *Elizabeth* daughter of the firſt wife hath iſſue and dieth; *Anne* dieth having iſſue; *Alice* dieth without iſſue; *Mary*, and *Elizabeth* born of the ſecond wife, die without iſſue; *Katherine* dieth without iſſue; in this caſe and by this deviſe, the ſon and heir of the elder daughter after the death of the ſon without iſſue, and of *Elizabeth* and *Mary*, and not all or any of the children or their children, ſhall have the land; becauſe *proximo* in Latin doth denote a perſon certain; and there be expreſs deviſes to others: but if in this caſe the remainder be limited in general to the next of blood without any other matter, all the daughters perhaps may have it as joint-tenants.

* P. 437.

Fitz. Deviſe 9. Perk. ſect. 508.

If a man have two ſons and a daughter which hath two daughters, and he deviſe his land to a ſtranger for life, the remainder to his ſecond ſon for life, the remainder in fee to the next of blood to his ſon; in this caſe, if the eldeſt ſon die without iſſue, the daughter and her daughters ſhall have the land.

Secondly, in reſpect of the thing deviſed.

See in the Expoſition of Deeds, ſupra.

Co. 8. 94. Plow. 525.

Whatſoever will paſs by any words in a deed, will paſs by the ſame words in a will, and more alſo; for a will is always more favourably interpreted than a deed: and therefore if a man deviſe the profits, uſe, or occupation of land, by this deviſe the land itſelf is deviſed.

Mevil's caſe. Fitz. Deviſe 4. Bro. Done, 41.

If a man deviſe thus, I give all my lands to *I. S.* or I give all my tenements to *I. S.* or I give all my lands and tenements to *I. S.*, by this deviſe *I. S.* ſhall have not only all the lands whereof the deviſor is ſole ſeiſed, but alſo all the lands whereof he is ſeiſed in common or coparcenary with another; and not only the lands he hath in poſſeſſion, but alſo the lands he hath in reverſion of any eſtate in fee-ſimple; but by this deviſe, regularly, leaſes for years of lands will not paſs.

Plow. 66.

If a man deviſe thus, I give all my land in poſſeſſion only; by this deviſe there is given the lands he hath in poſſeſſion only, and none of the lands he hath in reverſion.

Plow. 343. 344. old N. B. 89. Fitz. Deviſe 17.

If a man be ſeiſed of land in fee-ſimple in *Dale*, and deviſe thus, I give all my lands in *Dale* to *I. S.* and after the will made and publiſhed, he doth purchaſe other lands in *Dale* and dieth; in this caſe and by this deviſe *I. S.* ſhall not have the new purchaſed lands: and in this caſe it hath been held further, that if the teſtator do by word of mouth after the purchaſe of the ſame lands declare himſelf to be minded that *I. S.* ſhall have the ſame new purchaſed lands alſo by this deviſe, that notwithſtanding *I. S.* ſhall not have them by this deviſe: and yet it hath been adjudged, that if in this * caſe one come to the deviſor to buy his new purchaſed land, and he ſay nay, but *I. S.* ſhall have it as the reſt; that this is a new publica-

* P. 438.

Trin. 37 Eliz. B. R. Breckford verſus Parincer.

tion

tion of the will, and that *I. S.* by this deviſe ſhall have theſe new purchaſed lands; for a new publication of the will in theſe caſes will make the land to paſs (1). But if a man deviſe the manor of *Dale*, and at the time of the deviſe he hath it not, or deviſe his land in *Dale*, and at the time of the deviſe he hath no lands there, and afterwards he doth purchaſe the manor of *Dale*, or lands in *Dale*; by this deviſe, and in this caſe, the manor and the new purchaſed lands will paſs; for in this caſe it ſhall be intended he meant to purchaſe it. And yet the ſtatute enabling a man to deviſe lands, ſaith, *any perſon having*, &c. Co. 3. 30. See before.

If one have an ancient tenement, and lands belonging to it, and then purchaſe more lands, and occupy them altogether with the tenement many years, and being all thus in his occupation, he doth make a deviſe after this manner, I give my tenement in *Dale*, and all my lands belonging to it now in my occupation to *I. S.* by this deviſe *I. S.* ſhall have the ancient land only, and none of the new purchaſed land; but if there be no ancient land belonging to the tenement, but new purchaſed land only, there perhaps it may be otherwiſe; for in this caſe the words cannot elſe be ſatisfied. As in caſe where a man hath ſome lands in fee-ſimple, and other lands for years only in *Dale*, and he deviſe all his lands and tenements in *Dale*; by this deviſe the lands he hath for years do not paſs, but if he have no other lands in *Dale* but theſe lands, in this caſe perhaps this land will paſs. Loftus v. Baker. Hil. 20 Ja. B. R.

If one have a moiety of lands in *Eſſex*, and a moiety of lands in *Kent*, and he deviſe thus, I give my moieties, and all my other lands in *Kent* to *I. S.* it ſeems by this deviſe the moieties in both counties do paſs, and that *I. S.* ſhall have both the moieties. In Mervil's caſe.

If a man be ſeiſed in fee, in poſſeſſion, of the moiety of a farm called the farm of *C.* and of the reverſion in fee of the other moiety, expectant on a leaſe made to *A.* and *B.* for their lives, and he make his will thus, I will that my wife ſhall have all my living which I now occupy, until my ſon come to twenty-one years of age; and then I will have her have the thirds of all my living, and that my ſon ſhall have all my farm of *C.* to him and his heirs; by this deviſe if *A.* and *B.* die before the heir be twenty-one years of age, the wife ſhall have the thirds of the whole farm, and not of the moiety in poſſeſſion only. Paſch. 20 Ja. Adjudged Scatter-good's caſe.

If a man be ſeiſed of land in a village, and in two hamlets of the ſame village, and he deviſe all his lands in that village, and in one of the hamlets; by this deviſe none of his land in the other hamlet doth paſs. Dier 262.

If a man make his will the firſt day of *May*, and thereby give the * manor of *Dale*, to one in fee, and the tenth of *May* one of the tenancies eſcheat, and the twentieth of *May* the deviſor dieth; in this caſe, and by this deviſe, it ſeems the deviſee ſhall have the tenancy that doth eſcheat. Plow. 343.

* P. 439.

3. In reſpect of the eſtate and time that is deviſed. Fee-ſimple.

If one deviſe his land thus, I give my land in *Dale* to *I. S.* and his heirs, or to *I. S.* in fee, or to *I. S.* in fee-ſimple, or to *I. S.* for ever, or to *I. S. habendum ſibi & ſuis*, or to *I. S.* and his aſſigns for ever; or thus, I give my land to *I. S.* to give, ſell, or do Bro. ſect. 233. Perk. ſect. 16. Lit. ſect. 586.

(1) In what caſes lands acquired after the making of the will ſhall paſs, ſee page 412 and the notes thereto; and further as to a new publication of the will after a new purchaſe, in *Com. Dig.* Deviſe (E. 4.)—*Bac. Abr.* Wills, &c. (D. 3.)—4 *Burns Ecc. Law.* 65.—*Swinb.* 194. 516.

Kelw. 43. Co. ſuper Lit. 19. 20 H. 6. 35. Bro ſect. 432. 29 H. 8. 30.

therewith at his pleaſure; by all theſe, and ſuch like deviſes, a fee ſimple eſtate is made of the thing deviſed, and *I. S.* ſhall have the ſame to him and his heirs for ever. But if land be granted by deed after this manner, *I. S.* by this grant in all theſe caſes, except only in the firſt caſe, hath only an eſtate for life. And if a man deviſe his land to *I. S.* and ſay not how long, nor for what time, by this deviſe *I. S.* hath an eſtate for life only in the land. Deed.

Fitz. Deviſe 111.

Co. ſuper Lit. 9. Perk. ſect. 57, 239. New terms of the Law, tit. Deviſe. Trin. 2 C. B. R. Reply and Daniel's caſe. Co. 6. 16. Dier 126.

If a man deviſe his land to *I. S.* and his aſſigns, without ſaying [for ever] it is ſaid by ſome, that by this deviſe *I. S.* hath only an eſtate for life. But the contrary is affirmed elſewhere, and that it is a fee-ſimple.

If one deviſe his land to his wife, to diſpoſe thereof at her will and pleaſure, and to give it to one of her ſons; in this caſe, and by this deviſe, ſhe hath a fee-ſimple; but it is qualified, for ſhe muſt convey it to one of her children, and cannot convey it to another (1).

Adjudged Hil. 36. El. Co. B.

If one deviſe his land to *I. S.* paying ten pounds, and uſe no other words, by this deviſe the deviſee hath the fee-ſimple of the land, albeit the ten pounds be not the hundredth part of the worth of the land (2). And yet if one deviſe his land to *I. S.* for his life, paying ten pounds; by this deviſe *I. S.* ſhall have an eſtate for life only.

If one deviſe land of the value of fifty pounds *per annum* to *I S.* for life, the remainder to *I. D.* paying forty pounds to *W.*; by this deviſe *I. D.* ſhall have the fee-ſimple of the remainder upon condition.

Hil. 17 Jac. B. R. adjudged Spicer's caſe.

If one have two ſons, and he deviſe his land firſt to his wife, and then he ſaith thus: in like manner, I will that my ſon *A.* ſhall have it after my wife's death; and if my wife die before my ſon *B.* then that my ſon *A.* ſhall pay to *B.* three pounds by the year during the life of *B.* and alſo twenty pounds to *W. S.*; by this deviſe, *A.* ſhall have the fee-ſimple of this land.

Curia M. 18. Jac. B. R. Green verſus Dewel.

If one deviſe his land thus, I will my land to my ſon *W.* for his life, and after his death to my ſon *T.* and if my ſon *W.* purchaſe land as good as that land for my ſon *T.* then that my ſon *W.* ſhall ſell the land deviſed to my ſon *T.* as his own, and I will that my ſon *W.* ſhall pay to his ſiſters ten pounds by 20*s.* a year: in this caſe, and by this deviſe *W.* hath a fee-ſimple; for power to ſell giveth by implication an eſtate in fee-ſimple, and it is paying alſo, *&c.*

Paſch. 14 Jac. B. R. Curia.

If one deviſe land to his wife and her heirs, and if the heir put her * out that ſhe ſhall have other land: by this deviſe ſhe hath the fee-ſimple of the firſt land, and is not abridged by the latter words. * P. 440.

Trin. 30. Eliz.

If one deviſe his land thus, I give *White-acre* to my eldeſt ſon and his heirs for his part: *Item, Black-acre* to my youngeſt ſon for his part; by this deviſe the younger ſon ſhall have the fee-ſimple of *Black-acre*: ſo, if I give *White-acre* to *I. S. Item, Black-acre* to *I. S.* and his heirs; by this deviſe *I. S.* ſhall have the fee-ſimple of *White-acre* alſo.

(1) In the caſe of *Thomlinſon* v. *Dighton*, 1 *Salk.* 240.—*H.* being ſeiſed in fee, deviſed to his wife for her life, *and then to be at her diſpoſal to any of her children as ſhe ſhould be then living*: The court held it to be only an eſtate for life, with a power to diſpoſe of the inheritance.—See the ſame caſe more fully reported in 1 *Pr. Wms.* 149.

(2) See accordingly *Wellock* and *Hammon*'s caſe, 2 *Leon.* 124. and further in *Fitz. Abr. Deviſe* (S. 2.)

If one give land to his wife for life, the remainder to his ſon and the heirs male of his body, and, for want of ſuch iſſue, the remainder to the next heir male of the donor and the heirs male of his body; it ſeems by this deviſe, that the next heir male of the ſon hath a fee-ſimple (1). Perk. ſect. 566.

Fee-tail. If one deviſe his land thus, I give my land in *Dale* to *I. S.* and to his, or [to the] heirs male, or heir female of his body, [or of his body begotten] or to *I. S.* and his iſſues male, or his iſſues female; or to *I. S.* and the heirs male of his body begotten on *M.*; or to *I. S.* and *E.* his wife, and the heirs male, or heirs female of their two bodies begotten; or to *I. S.* and his heirs, if he ſhall have any heirs of his body, elſe that the land ſhall revert; or to *I. S.* and his heirs if he have any iſſue of his body; or to *I. S.* and the right heirs male of his body; or to *I. S.* and his heirs, provided that if he die without heirs of his body, that the land ſhall revert; by all theſe and ſuch like deviſes an eſtate tail is made of the thing deviſed, and *I. S.* the deviſee ſhall have the ſame accordingly. Co. ſuper Lit. 20, 26.

Deed. If one deviſe his land thus, I give my land in *Dale* to *I. S.* *& ſemini ſuo*; by this deviſe *I. S.* hath an eſtate-tail: but if he ſay, I give my land in *Dale* to *I. S.* *et ſanguini ſuo*: it is ſaid by this deviſe *I. S.* hath the fee-ſimple of the land. If one deviſe his land to *I. S.* *& exitibus, vel prolibus de corpore ſuo*; by this deviſe if *I. S.* have no children at the time, it ſeems he hath an eſtate-tail; but by ſuch a limitation by deed is made only an eſtate for life. If one deviſe his land thus, I give my land in *Dale* to *I. S.* for life, the remainder to *I. D.* and *E.* his wife and their children; or to *I. D.* and *E.* his wife and their men-children; or to *I. D.* and *E.* his wife and their iſſues; by theſe deviſes, if the huſband and wife have no children at the time of the deviſe, is created an eſtate-tail; and if they have any children at the time of the deviſe, then hereby is created an eſtate for all their lives only in joint-tenancy. And if land be deviſed to *A.* for life, the remainder to *B.* and the heirs of his body, the remainder to *I. S.* and his wife, and after to their children; by this deviſe *I. S.* and his wife have eſtates for their lives only, and their children after them eſtates for their lives jointly: and albeit they have no children at the time, yet every child they ſhall have after, may take by way of remainder. And ſo alſo it ſeems is the law upon ſuch a limitation by deed. Co. ſuper Lit. 9. Bro. tit. Tail 21. Co. ſuper Lit. 20. 6. 16.

Deed. * If lands be deviſed to *I. S.* and his heirs male, or his heirs female, without ſaying [of his body;] by this deviſe *I. S.* hath an eſtate-tail. But if ſuch a limitation be by deed, it is a fee-ſimple. Lit. ſect. 32. 9 H. 6. 25. 27 H. 8. 27.

* P. 441. Deed. If one have two ſons, and deviſe *White-acre* to his eldeſt ſon and his heirs, and *Black-acre* to his youngeſt ſon and his heirs, and if either of them die without iſſue, then that the other ſhall be his heir; by this deviſe either of them hath an eſtate-tail, and no fee-ſimple. Hil. 22 Jac. B. R. Daniel's caſe.

If one have land in *Kent* in *W.*, *S.* and *T.* and have one male child and a daughter, and his brother hath three children, *B.* *C.* and *D.* and he deviſe his land thus; *Item*, I give my land in *Kent* to my male child and his heirs, and if he die without heirs of his body, that the land in *W.* ſhall go to *B.* and his heirs. *Item*, I will my land in *S.* to *C.* and his heirs, and my land Adjudged M. 9 Jac. Wallop's caſe.

(1) See more amply what words will paſs a fee, in *Com. Dig.* Deviſe (N. 4.)—*Vin. Abr.* Deviſe (L. a.)—*Bac. Abr.* Deviſes (C.)—1 *Atk.* 436.—3 *Wilſ.* 414, *Frogmorton on dem. of Wright v. Wright and Kerſhaw.*

in

in *Tail* to *D.* and his heirs; in this case, and by this deviſe, the male child of the deviſor hath an eſtate tail in all the lands, and after his death without heirs (of his body), it ſhall remain according to the will; ſo that if one deviſe his land to his eldeſt ſon and his heirs, and if he die without heirs of his body, that it ſhall remain to his youngeſt ſon and his heirs; by this deviſe, the eldeſt ſon hath an eſtate tail, and the youngeſt ſon the fee-ſimple.

Co. 9. 127. If one deviſe his land to his ſon *W.* and if he marry and have any iſſue male begotten of the body of his wife, then that iſſue to have it; and if he have no iſſue male, then to others in remainder; by this deviſe, it ſeems *W.* hath an eſtate-tail to him and the iſſue male begotten on the body of his wife.

Perk. ſect. 561. 20 H. 6. 36. If one deviſe *White-acre* to *I. S.* and the heirs of his body, and then after ſaith thus, and I will that *I. D.* ſhall have *Black-acre* in the ſame manner that *I. S.* hath *White-acre*; by this deviſe, *I. D.* hath an eſtate-tail in *Black-acre*, as *I. S.* hath in *White-acre*. Tr. 30 Eliz. *Et ſic de ſimilibus.* And if one deviſe *White-acre* to *I. S.* and then ſay; *Item*, *Black-acre* to *I. S.* and the heirs of his body; by this deviſe he hath an eſtate-tail in both acres.

Dier 122. If one deviſe his land to his wife for years, the remainder to his younger ſon and his heirs, and if each of his two ſons die without iſſue, *&c.* that it ſhall remain to his daughter and her heirs, and the younger ſon die without iſſue; in the life-time of the father, and after the father dieth; it ſeemeth by this deviſe the elder ſon ſhall have the land in tail.

Adjudged Trin. 7 Jac. C. B. Robinſon's caſe. If one deviſe his land to his wife for life, and after to his ſon, and if his ſon die without iſſue, [or having no ſon,] then that it ſhall go to another; by this deviſe the ſon hath an eſtate-tail to him and the heirs male of his body.

Co. ſuper Lit. 20. 26. Plow. 35. * If lands be given to a man and woman unmarried, and the heirs of their two bodies, or to the huſband of *A.* and wife of *B.* and the heirs of their two bodies; by theſe deviſes are made eſtates in tail. * P. 342.

Dier 323. If a man deviſe *White-acre* to his three brothers, and *Black-acre* to *C.* his brother, ſo as he pay ten pounds to *I. S.* and otherwiſe that it ſhall remain to the houſe, provided that the ſame lands be not ſold, but go unto the next of name and blood that are males, if it may be; it ſeems that by this deviſe *C.* hath an eſtate-tail in *Black-acre*, and that if he die without iſſue, it ſhall go to three other brothers and their heirs male in tail one after another; and that *White-acre* alſo is ſo entailed in every of their parts. For the words [ſhall remain to the houſe] ſhall be conſtrued to the moſt worthy of the family, and the words [that are males] ſhall be conſtrued in the future tenſe.

Adjudged 24 Eliz. C. B. and Trin. 9. Jac. B. R. If land be deviſed to *I. S.* and the heirs of his body, and that if he die, that it ſhall remain to *I. D.* by this deviſe *I. S.* hath an eſtate-tail, and the latter words do not qualify the former, but *I. D.* muſt attend his death without heirs of his body before he ſhall have the land.

Dier 171. If land be deviſed to *I. S.* and the heirs male of his body, and if it happen that he die without heir of his body, that it ſhall go to *H.* and his heirs; by this deviſe *I. S.* hath an eſtate to him and the heirs male of his body, and the ſubſequent words do not alter nor enlarge the eſtate.

Co. ſuper Lit. 26. If land be deviſed to *I. S.* and *E.* his wife and to the heirs of the body of the ſurvivor of them; by this deviſe the ſurvivor ſhall have a general eſtate-tail.

Deed. If land be deviſed to *I. S.* and the heirs he ſhall have by *A.* his wife; by this devile *I. S.* hath a fee-tail, and not a fee-ſimple as he hath in caſe of ſuch a limitation by deed. Co. ſuper Lit. [illegible]

If land be deviſed to *I. S.* and to the heirs of the body of ſuch a woman begotten, by this devile *I. S.* hath an eſtate-tail, and begotten, ſhall be intended begotten by him. Co. ſuper Lit. 22.

If one devile land to his ſon and his heirs, and that if his ſon die within the age of twenty-one years or without iſſue, that the land ſhall remain over; and the ſon dieth within age having iſſue: in this caſe, and by this devile, the ſon hath an eſtate-tail, and [or] in this place ſhall be taken for [and]. Adjudged M. 37. 38 Eliz. Sale verſus Gerrard.

Deed. If land be deviſed to a man and his wife, and to one heir of their body, and the heir of the body of that heir; by this devise an eſtate-tail is made in a will as well as in a deed. Co. ſuper Lit. [illegible]

If a man devile his land thus, I give *White-acre* to *A.* my ſon and his heirs, *Black-acre* to *B.* my ſon and his heirs, and *Green-acre* to *C.* my ſon and his heirs, provided that if all my ſaid ſons die without iſſue of their bodies, that then all my ſaid lands ſhall * go to *M.* my wife and her heirs; by this devile they have all of them eſtates in tail of their land, and as it ſeems croſs remainders to either of them of the land of each other. M. 18 Jac. B. R. Gilbert's caſe.

* P. 443.

If one devile his land thus, I give my land in *Dale* to *I. S.* and if he die without iſſue male of his body, that then it ſhall remain over to *I. D.*; by this devile *I. S.* hath an eſtate-tail. Co. 9. 128.

If a man hath iſſue three ſons, and deviſe his land thus, *viz.* one part to two of his ſons in tail, and another part to his third ſon in tail, and that neither of them ſhall ſell his part, but that each of them ſhall be heir to the other; in this caſe, and by this deviſe, each of them hath an eſtate-tail, and if one of them die without iſſue, his part ſhall not revert to the eldeſt, but ſhall remain to the other ſon, for it is an implyed remainder. Lit. ſect. 42. Brot Deviſes 38. Done 44.

If there be huſband and wife, and they have iſſue a ſon and a daughter, and the huſband die, and land is deviſed to the wife and the heirs of her late huſband on her body begotten; in this caſe, and by this deviſe, the wife hath only an eſtate for life, the ſon an eſtate in tail, and ſo alſo the daughter in caſe he die without iſſue (1). Co. ſuper Lit. 26.

For life. If one deviſe to *I. S.* that if he and his heirs of his body be not paid twenty pounds rent yearly, he and they ſhall diſtrain, &c. by this devile *I. S.* hath an eſtate-tail of this rent. But if the devile be that if *I. S.* be not paid twenty pounds yearly, he ſhall diſtrain, &c. by this deviſe *I. S.* hath only an eſtate for life. So if one deviſe a rent of ten pounds out of his land to be paid quarterly, and ſay not how long the rent ſhall continue; this is but an eſtate for life. Co. ſuper Lit. 147. 8. 35.

If one devile his land thus, I give my land in *Dale* to *I. S.* for his life, or to *I. S.* [without any more words] or to *I. S.* and his heir in the ſingular number, or *I. S.* and his children, and *I. S.* hath children at the time of the deviſe, or to *I. S.* and his ſucceſſors (*I. S.* being a natural perſon); by all theſe and ſuch like deviſes *I. S.* hath only an eſtate for life in the thing deviſed. Fitz. Deviſe 16. Co. 6. 16. Perk. ſect. 577.

(1) See more amply what words give an eſtate-tail, in *Bac. Abr.* Deviſes (D.)—*Chan. Dig.* Deviſe (N. 5.)—*Vin. Abr.* Deviſe (N. a.)—1 *Ven.* 429.—*Eq. Ca. Abr.* Deviſes (D.)

But if the testator have only a term of years in the land whereof the devise be made, and devise this land to *I. S.* and doth not say for what time; it seems that by this devise the whole term is devised, unless the intent doth appear to be otherwise. And if a man devise land (whereof he is seised in fee) to *I. S.* paying certain pounds to *I. D.* by this devise, albeit there be no estate expressed, yet *I. S.* hath a fee-simple of the land, in respect of the payment of the money. But if the intent of the testator appear to be that *I. S.* shall have the land but for his life, *contra*, for there the consideration will not alter the estate expressed upon the gift.

Co. supra Lit. 9. 42 29.

If land be devised thus, I give my land in *Dale* to *I. S.* and his assigns, [without more words] by this devise is held to be given no more but an estate for life by construction upon a will, as it is upon a deed. And yet in the *New Terms of the law*, *tit. Devise*, the contrary is affirmed (1), *Ideo quære*. Deed. * P. 444.

Pasch. 9 Jac. Newman's case. Dier 342.

If one devise thus, I will that *I. S.* shall have and occupy my land in *Dale*, and say not how long; by this devise *I. S.* shall have the land for his life. But if I devise that *I. S.* shall enter into my land, and say no more; by this devise *I. S.* hath no estate at all, but power to enter into the land only.

See before, Lit. Sec. sect. 406.

Co. supra Lit. 21.

If a man have a son and a daughter, and dieth, and lands are devised to the daughter, and the heirs female of the body of the father; by this devise the daughter hath only an estate for her life; for there is no such person, for she is not heir.

Ch. 21 66.

If one devise his land thus, I give my land in *Dale* to *I. S.* for his life, and after to the next right heir of *I. S.* in the singular number, and to his right heirs for ever; by this devise *I. S.* hath only an estate for life. So if one devise land to *I. S.* for life, and after to the next heir male of *I. S.* and to the heirs male of the body of such next heir male; by this devise *I. S.* hath an estate for life only; but if it be thus, I give my land in *Dale* to *I. S.* for his life, and after to the heirs, or to the right heirs of *I. S.*; by these devises *I. S.* hath the fee-simple of the land; and if it be to *I. S.* for life, and after to the heirs male of *I. S.*; by this *I. S.* hath an estate tail (2).

If

(1) And see accordingly in *Swinb.* 250.—and 4 *Burn's Ecc. Law.* 122.

(2) It hath been said to be a general rule, that whensoever the ancestor takes any estate of freehold, whether for his own life or the life of another, or whether it be of such a nature that it may determine in his life-time or not, and there is afterwards, in the same conveyance, a limitation to his right heirs or heirs in tail, (either immediately without the intervention of any mean estate of freehold between his freehold and the subsequent limitation to his heirs, or mediately, that is, with the interposition of some such mean estate) there such subsequent limitation to the heirs, or heirs in tail, vests immediately in the ancestor, and does not remain in contingency or abeyance; with this distinction, that where such subsequent limitation is immediate, it then executes in the ancestor, and becomes united to his particular freehold, forming therewith one estate of inheritance in possession; but where such limitation is mediate, it is then a remainder vested in the ancestor who takes the freehold, not to be executed in possession till the determination of the preceding mean estates.—*Fearne on Cont. Rem.* 3d edition 25.——In the case of *Perrin* v. *Blake* decided in *B. R. Hil. Term* 10 *Geo.* 3. there was the following devise. "Should my wife be enfant with child, at any time hereafter, and it be "a female, I give and bequeath unto her the sum of 2000*l.* &c. and if it be a male, I give and bequeath my "estate real and personal equally to be divided between the said infant and my son *John Williams*, when the "said infant shall attain the age of twenty-one. *Item*, It is my intent and meaning *that none of my children "should sell or dispose of my estate for longer time than his life*, and to *that intent* I give, devise, and bequeath all "the rest and residue of my estate to my son *John Williams* and the said infant for and during the *term of their "natural lives*, the remainder to my brother-in-law *I. G.* and his heirs for and during the lives of my son "*John Williams* and the said infant, the remainder *to the heirs of the body of my said sons John Williams* and the "said infant lawfully begotten or to be begotten, the remainder to my daughters, &c." No other son was born, and the question was, what estate *John Williams* took under this will? whether for life or in tail?——This case was twice solemnly argued, and the court determined that *John Williams* took only an estate

By implication.

If one devise land to *A.* and *B.* his wife, and after their decease [or the remainder] to their children; by this devise, whether they have or have not children at the time, *A.* and *B.* his wife have estates for their lives only. Co. 6. 16b.

If one devise a moiety of his land to his wife for life, and the other moiety to his second son, and after by another clause doth devise it all to his son after the death of his wife; by this devise the son hath only an estate for life after the wife's death and no more. Curia 7 Ja. Co. B.

If one devise his land to *A. S.* in fee after the death of *A. B.* (being his son and heir apparent;) by this devise *A. B.* hath an estate for life by implication, and, until the devise take effect, the law gives it to him by descent. And so also it seems the law is, where one doth devise his land to *A. S.* after the death of his wife: that by this devise the wife hath an estate for life by implication (1). And therefore if a man devise thus, I give my goods to my wife, and that, after her decease, my son and heir shall have the house where the goods are; it is held by this devise that the wife hath an estate for life in the house by implication; for a man is bound to provide for his own wife. But if a man devise his land to *A. S.* after the death of *A. W.* (a stranger to the devisor;) it seems that by this devise *A. W.* hath no estate at all by implication, and that this doth but set forth when the estate of *A. S.* shall begin, and that the intent of the testator is that his heir shall have it until that time. Bro. Devise 48. 52. Lit. sect. 167. 13 H. 7. 13. New terms of the law. tit. Devise Plowd. 152. 414, 521.

If one devise land thus, I give my land in *Dale* to *A. S.* to the intent that, with the profits thereof, he shall bring up a child, or to the intent that with the profits thereof, he shall pay to *A.* ten pounds, or to the intent that he shall out of the profits thereof pay yearly ten pounds, by these devises *A. S.* hath only an estate for life, albeit the payments to be made be greater than the rent of the land: and therefore it is not like to the case before, where a sum of money is to be paid presently. * P. 445. Co. 6. 16. 3. 20. Bro. Estates 78.

If *A.* devise his land thus, I give my land to *Alice* my cousin in fee-simple, after her decease to *W.* her son (who is her heir apparent); by this devise she hath an estate for life first, the remainder to her son for his life, the remainder to the heirs of *A.* in fee-simple: and so also is the law, when the devise is to any other after that manner. Dier 357.

If my father be tenant for life of land, the remainder to me in fee, and I devise this land to my wife, rendering for her natural life forty shillings to the right heir of my father; by this devise my wife hath an estate for life after the death of my father. Dier 371.

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for life.——Lord *Mansfield* the Chief Justice, Mr. Justice *Aston*, and Mr. Justice *Willes* were of that opinion; and Mr. Justice *Yates* held that he took an estate tail.——From this judgment of the court of King's Bench a writ of error was brought in the Exchequer-chamber, where the decision of the court of King's Bench was reversed on the opinions of Chief Baron *Parker*, the Barons *Perrott* and *Adams*, and Justices *Gould*, *Blackstone*, and *Nares*,—against the opinions of Sir *William de Grey* Chief Justice of the Common Pleas, and Baron *Smythe*.—By this reversal the Judges appear to have been nearly equal (in number;) five being of opinion that it was an estate for life only, and seven that it was an estate-tail.—From this reversal an appeal was lodged in the House of Lords, but it was withdrawn upon a compromise.—As a similar case may frequently arise in *Wales*, it is matter of regret that the general question arising in *Perrie* and *Blake* was not finally decided by the appeal to the court of dernier resort.—Those who incline to think that the devisee took an estate tail may find that construction supported by a number of arguments in *Fearne's Essay on Cont. Rem.*——and for a further state of the case see 4 *Burr.* 2570.

(1) A devise of lands to the heir after the death of the wife, by a necessary implication, gives an estate for life to the wife, because the heir was not to take till after her death; but if the devise be to a stranger after the death of the wife, *that* gives no estate for life to the wife by implication; but the estate during her life shall descend, and go to the heir at law.—2 *Vern.* 572.—See further in *Bac. Abr.* Devises (G.)—*Com. Dig.* Devise (N. 12.)

If one devise his land unto his executors, until his son shall come unto twenty-one years of age, the profits to be employed towards the performance of his will, and when he shall come to that age, then that his son and his heirs shall have it; by this devise the executors shall have it until he be twenty-one years of age, and if he die before that time, until the time he should have been twenty-one years of age if he had lived so long; and [shall] in this case shall be taken for [should].

For years.

Co. super Lit. 42.

If one devise his land to his executors for the payment of his debts, and until his debts be paid; by this devise the executors have but a chattel and an uncertain interest, and they and their executors shall hold it until the debts be paid and no longer.

Co. Lit. 27. 346. Devise of land to executors.

If one devise his land to *I. S.* and the heirs male of his body for the term of fifty years; it seems that, by this devise, *I. S.* hath but a lease for so many years, if the heirs male of his body shall so long continue, and, that for want of issue male, the term of years shall end (1); and in this case, the executor or administrator, not the heirs male of *I. S.* shall have it after his death.

Executors.

Adjudged Lowen v. Coxe. Mich. 37. 38 Eliz. Co. B. Dier 25. Bro. sect. 133. Lit. 283. Perk. sect. 170. Dier 356.

If one devise his land thus, I give to *I. S.* and *I. D.* and their heirs, my land in *Dale* equally, or my land in *Dale* to be equally divided; by these devises *I. S.* and *I. D.* shall have and hold the land, not as joint-tenants, but as tenants in common, so that the heir and not the survivor shall have his part that first dieth: And yet in case of such a limitation by deed, it is otherwise: and if one devise his land to *I. S.* and *I. D.* and their heirs [without more words], it seems that by this devise they shall take and hold as joint-tenants. And yet if one devise land to *I. S.* and *I. D.* and the heirs of either of their bodies lawfully engendred, it seems* that by this devise *I. S.* and *I. D.* shall take and hold as tenants in common and not as joint-tenants.

Fourthly, in respect of other matters.

Dier 326.

* P. 446.

Pasch 9. Jac. Newman's case.

And so if one devise his land to *I. S.* and *I. D.* thus, I will that *I. S.* and *I. D.* shall have my lands in *Dale*, and occupy them indifferently to them and their heirs (2).

Hil. 13 Ja. B. R. Adjudged Blandford's case.

If one be possessed of a term of years of land, and devise the same to his wife during all the years, and if she die within the years, then to *A.* and *B.* his two sons, if they have no issue male; but if they or either of them have issue male, then that it shall go to the use of those issues male; and she die and the two sons die without issue born, one of their wives being privily with child of a son, which after his death is born; in this case and, by this devise, this issue male shall have it as soon as he is born.

Devise of goods and chattles.

First, in respect of the person that shall take by the devise.

Co. 10. 46. Lampet's case. Perk. sect. 558, 559.

If one be possessed of a term of years, and he devise it to another and his heirs, or his heirs male; by this devise the executors or administrators, not the heirs of the legatee shall have it. And therefore, if lessee for years of land devise all his in-

Executors.

Heir.

(1) In *Burgis* v. *Burgis*, 1 *Mod.* 115, Lord Keeper denied the opinion of Lord *Coke* in *Leonard Lewis's* case, which saith, that in case of a lease *limited* to one and the heirs male of his body, when he dies the estate is determined; for *Finch* said it should go to his executors. ——And in the duke of *Norfolk's* case, 3 *Chan. Ca.* 30. Lord *Nottingham* said, it was Lord *Coke's* error in *Lewis's* case to say, that if a term be *devised* to one and the heirs male of his body, it shall go to him or his executors, no longer than he has heirs male of his body, it having been resolved otherwise in *Lewinthorp* and *Ashley's* case, 11 *Car. B. R. Roll. Abr.* tit. Devise. fo. 611. for these words are not the limitation of the time, but an absolute disposition of the term. ——See accordingly and further as to the limitation of a chattel, in *Fearne on Cont. Rem.* 344.—and *note* 3 (referred to before) to 13th edit. *Co. Lit.* 20. a.

(2) See very fully as to what words create a joint-tenancy or a tenancy in common, and their different operation when contained in a deed or in a will, in *Bac. Abr.* Joint-tenants, &c. (F).—*Com. Dig.* Chancery (3 V. 4.)—*Vin. Abr.* Joint-tenants (G).

terest

terest therein to his wife if she live so long, and after her death, if any part of the term be to come, devise the same to *I. S.* his son and the heirs of his body; in this case, and by this devise, the executors and administrators of *I. S.* not his heirs shall have it, at least, so long as he hath any heirs of his body: and yet if one possessed of a term of years, devise it to *I. S.* and after his death, that the heir of *I. S.* shall have it; in this case, *I. S.* shall have so many years of the term as he shall live, and the heir of *I. S.* and the executor of that heir shall have the residue of the term.

v. p. 427.

If one give ten pounds to the children of *I. S.* and at the time of the devise *I. S.* hath four children, and after, before the death of the testator, he happen to have two more; in this case, and by this devise, the two children he hath afterwards shall have no part of the ten pounds, but those four he had before shall have it all. Swinb. 316.

If one give ten pounds to his parish church, and, at the time of the will made, he live in one parish, and after he doth remove into another parish, and die there; by this devise the parish where he lived before, and not where he died, shall have this ten pounds. Swinb. 316.

Secondly, in respect of the things.

If one devise a third part of all his goods and chattels; by this devise, some say, doth pass and is given no more but a clear third part after debts and legacies paid: but it seems a third part of the whole is hereby devised, out of which the debts must first be paid by law. Dier 19, 164.

If one devise to another all his goods and chattles, or all his plate, or all of any other thing in general; by this devise doth pass and is given not only all the testator hath of that thing at the time of the making of the will, but also all he hath at the time of his death; and not only what he hath in possession, but also what he hath not in * possession: but if one devise all his goods, or all his plate, &c. in such a place, or in the occupation of *I. S.*; by this devise none other will pass but what are in that place, or in the occupation of *I. S.* Plow. 343, Swinb. 318.

* P. 447.

Tithes.

If one have a term of years of a portion of tithes in *Dale*, and have a term of years of land in *Dale*: and he devise all his lands and tenements in *Dale*, and all his estate therein to *I. S.*; by this devise the portion of tithes doth not pass, for it is neither land, nor tenement: but by devise of all his hereditaments, perhaps it may pass. *Sed quære.* By the opinion of divers lawyers,

Goods and chattels.

If one devise to *I. S.* all his goods and chattels; by this devise doth pass and is given all his estate active and passive, (except land of inheritance and freehold estates, and such things as depend thereon,) as leases for years, wardships by tenure *in capite*, or by knight's service (1), gold, silver, plate, household stuff, cattle, corn, debts, and the like; and if one devise to *I. S.* all his goods, or all his chattels, by either of these is devised as much as by both of them. Portman v. Willis. Pasche. 36. Eliz. Co. B. Co. super Lit. 118. Swinb. part. 7. c. 10.

Moveables.

If one devise to *I. S.* all his moveables; by this devise doth pass all his personal goods, both quick and dead, which either move themselves, as horses, sheep, and the like; or may be moved by another, as plate, household-stuff, corn in the garners Swinb. 305, 306, 205.

(1) A guardian by Knight's service might have devised the ward of the body and land; so of a guardian in socage; but a special guardian appointed pursuant to the statute of 12 *Car.* 2. c. 24. cannot transfer the custody of the ward, by deed or will, to any other. *Vaugh.* 179.—*Bac. Abr.* Devises (B.)

and

Agreed Hil. 9. Car. C. B.

and beans, or in the sheaf, &c. also all bonds and especialties; and by a devise of immoveables do pass leases, rents, grass, and the like, but not any of those things that do pass by the devise of moveables; but debts will not pass by either of these devises.

Swinb. 313. part. 7. c. 10.

If one devise to another all his household-stuff, hereby do pass his plate, coaches, tables, stools, forms, beds, vessels of wood, brass, pewter, earth, and the like; but not his apparel, books, weapons, tools for artificers, cattle, victuals, corn, plow-geere, and the like: by a devise of all utensils, it is agreed that plate and jewels do not pass. Household stuff.

Dier 59.

Swinb. 302.

If a man devise to *I. S.* one of his horses, or a horse; by this devise *I. S.* shall have the election, if there be more than one, which horse he will have: but if the devise be thus, I will that my executor shall deliver to *I. S.* one of my horses; in this case, the executor hath the election, and he may deliver which of them he will. Election.

Swinb. 94.

If one devise thus, I give to *I. S.* my corn growing in such a ground this next year, or the lambs of my flock this next year; by these devises the legatee shall have no more but what doth grow that year: but if he devise so many quarters of corn, or so many lambs; in these cases so much must be paid howsoever.

Co. 4. 66. Plow. 520. Co. 7. 23.

If one have a lease for years of land, and devise it to *I. S.* for life; by this devise the whole term is devised, and *I. S.* the devisee shall have the whole term, if he live so long; and yet *I. S.* shall not have an estate for life by this devise: and so also it seems the law is upon a grant by deed after this manner: and if a man possessed of a term of years of land devise his term, or his lease, or the land itself by a devise, in either of these cases the whole term doth pass. Thirdly, in respect of the time. * P. 448. Deed.

Dier 307.

Pasch. 14 Jac. B. R. Gough and Hayward's case.

If a man be possessed of two houses for years, and devise them to his wife for her life, if she live sole, the remainder to *I. S.*; and if she marry then that she shall have one of them during the rest of the term, [and then addeth these words,] and also, I will that she shall have twenty pounds a year out of my other lands; in this case, and by this devise, it seems the annuity shall continue during the term. *Sed quære*, for the judges were divided in this point.

Plow. 540. Swinb. 354.

If a legacy be given, and no time is set for the payment or doing of it, if it be simple, it must be paid and done presently; if it be conditional, and upon a condition precedent, it must be paid or done at the time the condition is first extant; and if there be a time set for the payment or doing of it, it must be paid or done at the time appointed (1).

Co. super Lit. 236. 112, 113. 15 H. 7. 12. Dier 177. 219. Kelw. 107. 108.

Devise of lands to executors to sell, to pay debts, legacies, &c. 9. Devise of lands to executors or others to sell; or that executors or others shall sell or otherwise dispose them: how this

(1) By the civil law, executors have a year's time, from the death of the testator, to pay legacies: and, in conformity to the civil law, the same rule hath been taken up, and is now followed, in the court of Chancery. *God. Orp. Leg.* 272.—2 *Salk.* 415. See fully at what time legacies are to be paid, and from what time they shall carry interest, in *Bac. Abr.* Legacies (K).—*Com. Dig.* Chancery (3 Y. 9).—4 *Burn's Ecc. Law*, 308.—*Eq. Ca. Abr.* Legacies (D). and (F).

shall be taken, and what sale and disposition shall be good or not.

to be sold, or to the end that they shall sell it; in the first case, the executors have only an authority and no interest, and therefore in that case the land doth descend in the interim to the heir of the devisor, and he shall have the profits of the land until it be sold; and if it be never sold, he shall ever have the profits of it; and in this case, they may sell it when they will, if they be not hastned thereunto by order of court, and when they do sell, they must all join in the sale by the common law, or otherwise the sale had not been good; and therefore if one or more of them had died before the sale, they that had survived or their executors could never have sold it by this authority; so likewise if any of the executors had refused the charge of the will, the land could not have been sold by the rest, unless the words of the will had been that his executors or some of them should sell it; for in that case, some of them even by the common law itself might have sold, and now also by the statute of 21 *H.* 8. *cap.* 4. some of them may sell it without the rest (1): as if one give his land to *A.* for life, and that after his decease it shall be sold by his executors, and make four executors, and one of them die during the life of *A.* and then *A.* dieth; in this case, the other three executors may sell: so if one give his land in tail, and that if the donee die without issue, that the land shall be sold by his sons-in-law; and he hath then five sons-in-law, and one of them die in the life-time of * the donee, and after the donee die without issue; in this case, the other four may sell the land, and the sale made thereof is good: and yet if the words of the will be, that it shall be sold by *A. B.* and *C.* his executors, or his sons-in-law; in this case, if one of them die, it cannot be sold by the rest: but in the last case before, where the devise is, I give my land to my executors to be sold, *&c.* the executors have an interest in the land, and an authority about the land also; and therefore, in this case, the descent is prevented, and the executors shall keep it till the sale; neither will any disseisin, fine, recovery, or feoffment by the heir, prejudice their interest, but that they may sell it when they will; but they must sell in time convenient, or otherwise the heir may enter and put them out by a condition in law, that is annexed to the interest; or perhaps the heir may tender to them the worth of the land, and if they refuse to accept it, he may enter upon them, and oust them: and it seems in this case, the mean profits until the sale are no assets; but the money made upon the sale shall be assets in their hand: and in this case, albeit one or more of the executors die or refuse, yet the rest may sell it, even by the common law itself, and so also by construction upon the same statute, for the estate surviveth. But it seems they may not sell to him that doth refuse; neither may they in either case transfer their power to sell to any other, nor keep the land themselves, and pay so much of their own money as the land is worth.

Perk. sect. 543, 544. Lit. Rep. sect 371. Kelw. 40.

45.

* P. 449.

Assets.

(1) That excellent statute enacts, that where part of the executors named in any will, whereby lands are directed to be sold by the executors thereof, do refuse to take the administration and charge of the will, and the rest of the executors do accept and take upon them the charge of the will, that all bargains and sales of such lands so directed to be sold, made by the executors accepting, shall be as effectual as if the executors so refusing had joined.

Perk. sect. 542. Dier 331, 26.

If one deviseth by his will, that his land shall be sold to pay his debts, and say not by whom; in this case, it shall be sold by his executors: and if one devise all his land except one acre, which he doth appoint to pay his debts; by this devise his executors or the survivor of them may sell it: but if one say by his will, that *I. S.* shall have *tam gubernationem puerorum meorum, quam* the disposing, letting, and setting of my lands; by this devise *I. S.* hath not power given to him to sell the land.

Dier 219.

If one devise that his land shall be sold after the death of his wife by his executors with the assent of *I. S.* and make his wife and a stranger his executors and die, and after *I. S.* die; in this case, the land cannot be sold, for the authority is determined.

Dier 151. 152.

If one devise that his executors shall sell the land, and, with the money coming or made of it, shall pay such and such legacies or sums of money in particular, to such and such persons by name; this is not a legacy for which a suit lieth in a court christian; but for this, every one that is to have portion, may have accompt against the executors after the sale.

Trin. 2 Car. B. R.

If one give lands to another, to give them again to the children of the testator, or to dispose them at the will of the devisees to some of the children of the devisor; in these cases, the devisees * must dispose it accordingly, and cannot give to any other: and if one gives land to others, to the intent that with the profits thereof they shall educate children, or pay such sums of money, or, *&c.* in this case, the devisees must do accordingly, or they may be compelled thereunto.

* P. 450.

Co. 6. 16.

Co. super Lit. 112. 113.

And in all cases of devises of lands to executors to sell, it is wisdom to make it certain; *i. e.* that the executors or the survivor of them, or such or so many of them as take upon them the probate of the will, (if his meaning be so) shall sell it (1). And it is better to give an authority, than an estate, unless his meaning be that they shall take the profits of the land until the sale; and if he do so, then it is necessary that he appoint that the mean profits until the sale, shall be assets in their hands; for otherwise it shall not be so (2).

10. Devise upon condition, and what words in a will shall be construed in the sense of a condition, and what not.

Dier 33. 348. 126. Co. super Lit. 236. See Condition.

The same words that in a deed will make a condition, and the thing granted thereby to be conditional, will make a condition in a will, and the thing given thereby to be conditional: And therefore these words, *Provided, On condition, So that, If,* and the like, will make a condition in a will: so that if one devise

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(1) In the case of *Fick* v. *Edwards*, 3 *P. Wms.* 372. *A.* devised lands to *B.* and *C.* and the survivor, in trust to sell. The estate was decreed to be sold, and it being referred to the master to see, whether the parties could make a good title, the master reported, that the parties could not make a good title, there being no fee-simple in the trustees, for that the remainder in fee could not be vested in the survivor, and it was uncertain, which of the two trustees would be the survivor.—But exceptions being taken to the master's report, the Lord Chancellor held, that the trustees joining in a fine of the premisses would pass a good title to the purchaser by estoppel.—See the case and the reporter's *Quære* thereon.

(2) This subject is fully discussed by the learned editor of *Co. Litt.* in note 2 to fol. 113. a. wherein he observes, "What Lord *Coke* advances touching the effect of a will devising that executors shall sell land, is open to a variety of observation. He first supposes that such a devise passes no *interest* or estate to the executors, but merely a *power* or *authority*; and thence he infers, that, like naked authorities, it will not survive. But these positions seem at least controvertible, having been expressly contradicted by decisions since Lord *Coke's* time: and though both should be admitted to be true in point of *law*, they would not avail in a court of *equity*, as this jurisdiction, notwithstanding the extinction of the power at law, would compel its execution in favour of those, for whose benefit the power was given."—See further as to sales of land by executors, in *Vin. Abr.* Devise (K. e.) to (S. e.)—4 *Burn's Ecc. Law*, 301.

land,

land to *I. S. on condition*, or *So that*, or *If*, or *provided* that he do bring up his eldeſt ſon, or pay his wife twenty pounds a year for her life, or the like; by theſe deviſes, the eſtate is made conditional: alſo other words, that being uſed in a deed will not make a condition, yet being uſed in a will, make a condition, and the eſtate made by the deviſe to be conditional: and therefore, if a man deviſe his land to his executors to be ſold; or deviſe his land to them, or others to pay twenty pounds to *I. S.* or paying twenty pounds to *I. S.*; in theſe caſes, and by theſe deviſes, the eſtates are made conditional: and of theſe conditions regularly the heir, and not a ſtranger, ſhall take advantage. So as if one deviſe land to another, and his heirs, provided that he pay ten pounds to *I. S.* otherwiſe that the land ſhall remain to *I. D.* and his heirs; in this caſe, if the deviſee do not pay the money, *I. D.* ſhall not take advantage of it, nor have the land according to the deviſe, but the heir of the deviſor ſhall enter and have the land and put out the deviſee. And if one deviſe his land to *I. S.* for life, on condition to pay twenty pounds to *I. D.* and after to *I. D.* in tail; in this caſe, if *I. S.* do not pay the twenty pounds, it ſeems the heir ſhall enter and hold the land during the life of *I. S.* and that *I. D.* ſhall not have it till then. Dier 33. 348. 126. 128.

And in caſes of deviſes of goods or chattels, other words will make a deviſe conditional in divers caſes; as [when,] as, I give to *I. S.* ten pounds when he ſhall be married; and [whiles,] as, I give to *I. S.* twenty pounds whiles he ſhall abide with my children, which is as much as if he abide with my children; and [which,] as, I give him twenty pounds which ſhall marry my daughter; and the ablative caſe * abſolute, as, my ſon being dead, I give to *I. S.* twenty pounds. And of all theſe conditions, regularly, the executor and no other ſhall take advantage. But if the condition be ſuch, for the matter and ſubſtance of it, as is impoſſible, unlawful, or the like; there perhaps theſe words may not make a condition, nor the thing deviſed conditional, but rather make the whole ſentence void. Whereof read *Swinb. part.* 4. *ſect.* 5. at large (1). Swinb. 136.

* P. 451.

11. Where a deviſe, void or voidable in its inception, may become good by matter *ex poſt facto*, or not.

If one deviſe his land to his daughter and heir apparent in fee-ſimple, this deviſe is void; yet if, in this caſe, the wife of the deviſor be privily with child of a ſon which is born after his death, now is the deviſe become good, for now ſhe is not heir to her father. Fitz. tit. Aſſiſe 27.

If a woman, that hath a huſband, deviſe her land by will during the coverture, and after her huſband's death, when ſhe is ſole, ſhe do publiſh and approve it; in this caſe, and by this means, the deviſe is become good; but if ſhe make and publiſh it during the coverture, and after her huſband die and ſhe become ſole, this accident without any more will not make the deviſe good: the ſame law is of the deviſe of goods and chattels. Plow. 344.

If an infant within age deviſe his lands or goods and publiſh his will, and after he comes to be of full age, he doth publiſh and approve it again; in this caſe, and by this means, the deviſe is become good: but if the infant live to be of full age, and do not publiſh and approve it, *contra*. Plow. 349.

(1) See further what words make a condition in a will, and as to the effect of conditions inſerted in wills, in *Vin. Abr.* Deviſe (D. c.)—*Com. Dig.* Deviſe (N. 9.)

Swinb. 340.

If a legacy of goods or chattels be given on condition to a man incapable, and, before the condition is extant, he doth become capable; in this caſe, and by this means, the deviſe is become good. See before, at *numb.* 6. more of this matter.

Lit. 168. Co. ſuper Lit. 112. Plow. 540. 541. Co. 8. 94. b. 33.

A deviſe that hath a good beginning, is ſometimes avoided and overthrown by ſubſequent matter in the ſame will, and ſometimes by ſubſequent matter in another will, and ſometimes by ſome other accident *ex poſt facto*. For if a man make a ſubſequent or latter deviſe, either in the ſame or in another will, ſo contrary and repugnant to the former, that both cannot ſtand together, this doth overthrow the former: and therefore, if a man do give *White-acre* to *I. S.* in fee, or his white horſe to *I. S.* and after, by the ſame or another will, doth give *White-acre* to *I. D.* in fee, or his white horſe to *I. D.* theſe latter deviſes do overthrow the former, *cum duo inter ſe pugnantia reperiuntur in teſtamento, ultimum ratum eſt*: and as a latter will doth overthrow the former, ſo the latter part of a will doth overthrow the former part of the ſame will: but if the deviſes be ſuch as they may ſtand both together, and are not directly repugnant, nor do fight one againſt another, there the latter ſhall not overthrow the former, but both ſhall be received. As if one deviſe his land to *I. S.* and his heirs, and * after by the ſame will deviſe a rent out of the ſame land to *I. D.* and his heirs, or *e contra*. So if one deviſe *White-acre* to *A.* for life, and afterwards give the ſame acre to *B.* in fee; in this caſe, the one may have it for his life, and the other may have the fee-ſimple afterwards.

12. Where a deviſe, good in its inception, ſhall or may become void by matter *ex poſt facto*, or not.

By a ſubſequent repugnant will.

See before.

* P. 452.

Plow. 545. Perk. ſect. 569. Lit. 453. Kitchin 127. Dier 317. 350.

If one deviſe his land to his ſon and heir in fee-ſimple; or deviſe it to a ſtranger for years, the remainder to his ſon and heir in fee-ſimple, and the heir, after the death of the deviſor, doth (as he may) wave the eſtate given him by the deviſe, and claim the land by deſcent; in this caſe, and by this means, the deviſe is become void. But if the deviſe be to the ſon and heir in tail, the remainder to a ſtranger, there he cannot wave the deviſe and take it in any other manner. And ſo if a man have only two daughters, (who are his heir) and he deviſe his land to them; or have gavelkind land, and deviſe it to all his ſons; they may not wave theſe deviſes and take by deſcent; for by deviſe they ſhall take as joint-tenants, who otherwiſe by deſcent ſhall take as parceners.

By a waving of the eſtate deviſed.

Lit. Bro. ſect. 482. Perk. ſect. 569. Dier 61. Co. 9. 140. Plow. 543. 544.

If one deviſe his land to another in fee-ſimple, fee-tail, for life, or years, and the deviſee after the death of the teſtator doth refuſe and wave the eſtate deviſed to him; in this caſe, and by this means, the deviſe is become void. And it ſeems a verbal waver is ſufficient in this caſe. So if one give goods or chattels to another, and the deviſee refuſe it; by this means the deviſe is become void, and any waver or refuſal will ſuffice in this caſe; for a man ſhall not be compelled *nolens volens* to take a thing deviſed to him.

Plow. 348.

If a woman ſole deviſe her lands or goods by will, and after take a huſband and die during the coverture; by this means the deviſe is become void. And yet if ſhe ſurvive her huſband, and die unmarried, now is the deviſe become good again.

Plow. 60. 346. 344. 341.

If one deviſe his land to *I. S.* and his heirs, and afterwards *I. S.* die living the teſtator; by this means the deviſe is become void. And in this caſe no verbal declaration of the teſtator, that the heirs of *I. S.* ſhall have it, will help; for albeit a

deviſe of land in writing may be revoked by a verbal ſubſequent declaration (1), or by any act croſſing or controlling that deviſe, yet a deviſe becoming void by that means cannot be made good by any ſuch verbal declaration ſubſequent to the ſame countermand. So if one give any goods or chattels to *I. S.* and he die before the teſtator; in this caſe, and by this means, the deviſe is become void, and the executor of *I. S.* ſhall not have it. And yet if a deviſe be of land to *A.* for life, the remainder to *B.* in tail, and *A.* die before the teſtator; it ſeems the deviſe of the remainder doth continue good notwithſtanding. See infra numb. 14. Perk. ſect. 567, 568.

And if one deviſe land or goods to the wife of *I. S.* and afterwards her huſband dieth, and ſhe marry with another man, and then * the deviſor dieth; this is a good deviſe notwithſtanding, and not avoided by either of theſe accidents. Plow. 344.

* P. 453.

If one deviſe a term that he hath to *A.* for life, the remainder to ſuch perſons as ſhall be occupiers of *White-acre* at the death of *A.*; this deviſe, albeit in its beginning it be good, yet if the deviſor die before *A.* it ſeems now to become void; for he that will take by way of executory deviſe, muſt take as an immediate purchaſor, and be capable and known at the time of the death of the teſtator. Per. Juſt. Jones M. 9. Jac. Co. B.

If I give to *I. S.* twenty pounds if he marry my daughter, and ſhe die before he marry her; in this caſe, and by this means, the legacy is become void. Swinb. 356.

If I give a debt owing to me to *I. S.* and afterwards I receive or releaſe the debt; hereby the deviſe is become void.

If a man make a will and give legacies, and appoint one or more his executor or executors, and he, or they after his death all refuſe to take upon them the adminiſtration; yet in this caſe the legacies remain good, and are not become void: and in this caſe, the courſe is to grant the adminiſtration of the goods to him to whom it doth belong, and to annex the will to the adminiſtration, and then the adminiſtrator is to perform the will as the executor ought to do. Lit. Rep. ſect. 399.

It is held alſo that a legacy of goods or chattels may become void by the injurious dealing of the legatee againſt the teſtator after the legacy given: whereof read *Swinb. part.* 7. *ſect.* 22.

And when the thing deviſed is dead, or ſpoiled; howſoever by this means the deviſe is not become void, yet it looſeth its effect, and is as if it were void. See more *ſupra* at *numb* 5. Swinb. 357.

13. Where a legacy ſhall go to the executor when the legatee doth die, before he doth receive it; and where not.

In all theſe caſes when the diſpoſition of the legacy is pure, and no time is ſet for the performing of it; or there is a ſet time for the doing of it, and the legatee die before the time; and where the diſpoſition of the legacy is conditional, and a time ſet for the doing of it, if the legatee live till that time, or the condition be performed; in all theſe caſes, the executor or adminiſtrator of the legatee ſhall have the legacy, and the ſame remedy to recover it, that the legatee himſelf had. But if the legatedie before the condition be performed, *contra*: And yet if in that caſe the teſtator's mind ſhall appear to be that the executor or adminiſtrator of the legatee ſhall have it; or the condition be to be performed by another, and there be no default Swinb. 350. 355. 356.

(1) But ſee the 6th *ſect.* of the *ſtat.* 29 *Car.* 2. *c.* 3. which makes a written revocation neceſſary, mentioned before in the *note* to *p.* 395.

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in the legatee; or if the diſpoſition be modal; or the legacy, that was at firſt upon condition, be afterwards repeated without condition; or it be referred to a condition to be afterwards ſet down, and none is ſet down; in theſe caſes, the legacy is not loſt by the death of the legatee, but ſhall go to his executor or adminiſtrator: as for example; If one deviſe twenty pounds to *W. S.* to be paid within four years after the death of the teſtator, and the legatee die before the four years expired; in this caſe the executor or adminiſtrator after the four years ſhall recover the legacy. If one give to *W. S.* twenty pounds when he cometh to twenty-one years of age, and he die before he come to the age of twenty-one years; in this caſe his executor ſhall not have the legacy. But if the deviſe be thus, I give to *W. S.* twenty pounds, and I will that it ſhall be paid him at his age of twenty-one years, and he die before he come to the age of twenty-one years; in this caſe, his executor ſhall recover the legacy. So if one give to *I. S.* twenty pounds when he ſhall be married, and he die before marriage, in this caſe, his executor ſhall not have it. But if one deviſe thus, I give to *W. S.* twenty pounds towards his marriage, and he die unmarried, in this caſe, the executor ſhall have and recover the legacy. So if one do give to *W. S.* twenty pounds when the executor of the teſtator ſhall die, in this caſe, if *W. S.* die before the executor, the executor or adminiſtrator of *W. S.* ſhall not have the legacy. If one deviſe goods or chattels to *I. S.* and *I. S.* die before the teſtator, the executor or adminiſtrator of *I. S.* ſhall not have this legacy (1).

Bro. Deviſe 27. 45. Swinb. 359. 355. Dier 59. Swinb. 358. 356. Plow. 345

* P. 454.

When any chattel real or perſonal is given to an executor by a will, the executor hath an election given him by the law to have and take it in the one right or in the other, *viz.* as executor, or as legatee: and by his ſpecial entry, or ſeizing of the thing, or ſome ſpecial declaration, his election, is to be made. And if the executor do enter generally (as moſt do), and never make any declaration which way, or by which right he will have it, (as moſt executors uſe to do) he ſhall be ſaid to have it, and the law will adjudge it in him, as executor, and not as legatee. But if by any ſubſequent words or deeds he ſhall declare his mind to be otherwiſe, he ſhall be in as a legatee *ab initio*; and yet if once he do any ſuch act as is proper to an executor, this is a diſagreement to the legacy *ab initio*; and after that it ſeems he cannot take as legatee, but muſt take as executor. And if one executor of many, to whom a term of years of land is deviſed, occupy the ſame alone, and the reſt intermeddle not with the profits thereof, albeit he make no declaration, it is ſaid this is a good declaration of his election to have it as legatee. But if a term of years be given to the wife of *I. S.* and *I. S.* be made executor and he enter generally, and after makes his teſtament and never ſpeaks of this term; this is no decla-

Plow. 519. 520. 543. Co. 10. 47. 2 37. 8. 96. Dier 277. 367. Perk. ſect. 574. 573. 575.

14. Where an executor upon a deviſe to him hath an election to have the thing deviſed as executor, or as legatee: and when he ſhall have it in the one right or in the other: and what act ſhall make a declaration of his election.

(1) And if one gives a legacy to a man, his executors, adminiſtrators, and aſſigns; if, in ſuch caſe, the legatee dies in the life-time of the teſtator, tho' the executors are named, yet the legacy is loſt; for the words [executors, adminiſtrators, and aſſigns] are void, being but ſurpluſage, *et expreſſio eorum &c.* and they are by ſuppoſition of law named only to take in ſucceſſion, and by way of repreſentation, as an heir repreſents the anceſtor in caſe of an inheritance.—*Elliot* v. *Davenport*, 1 *Pr. Wms.* 84. in that caſe it was held that a will might be ſo penned, as that, tho' the legatee died in the life of the teſtator, yet his executors ſhould have the legacy; but then it ought to appear in the will plainly, and by direct words, that this was the teſtator's intention.—See fully as to the doctrine of lapſed legacies in *Eq. Ca. Abr.* Legacies (B).—*Vin. Abr.* Deviſe (X. e), *&c. Bac. Abr.* Legacies (E).—*Com. Dig.* Chancery (3 Y. 13).

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ration of his election to have it as legatee, neither shall the term be so deemed in him, but as executor. But in these cases this must be heeded, that howsoever the executor hath power to take as executor or as legatee, yet he cannot take as legatee to prejudice creditors in their debts; but the same things he so takes as a legacy, if there be not enough besides, shall be held to be assets in his hands, as to the creditors for the satisfaction and payment of their debts.

* P. 455. * If a man devise that, after his debts and legacies paid, his wife shall have all the residue of his goods and chattels to distribute for his soul, &c. and make his wife his executor; in this case, it is said she hath no election, but she must take as executor, and cannot take as legatee. Dier 331.

15. Assent. *Quid.* When a devise of goods or chattels is well made, the assent of the executor is necessary to the perfection thereof, for until then the legatee may not have or meddle with the thing devised. And this assent is defined to be the agreement of an executor or administrator, that a legatee shall have the thing bequeathed unto him. And it is either express, *i. e.* when the executor or administrator doth by express words agree to the devise, or implied, *i. e.* when the executor doth not by words, but by some overt act, declare his assent that the legatee shall have the thing devised unto him (1). Co. 13. 17. 152.

16. Where an assent is necessary, or not: and where a man may enter into the lands or take the goods or chattels devised unto him without the assent or delivery of the executor: and what shall be said a sufficient assent to execute a legacy, or not.

This agreement of the executor or administrator is *not* needful in the case of devise of land; for if a man be seised of land in fee-simple, and deviseth to another in fee-simple, fee-tail, for term of life, or years; in these cases, the devisee may enter into the land devised without any leave of the executor or administrator: and in truth in these cases the freehold or estate is said to be in the devisee before his entry: and therefore, if the heir enter first, the devisee may enter upon him, and put him out. And in case where land is devised by the custom of a place, if the heir enter first and keep the devisee out, the devisee may have a writ of *ex gravi querela* against him for his relief: and this writ is incident to that custom. But if a devisee enter first into the land devised unto him, and then the heir of the devisor enter upon him, then the devisee may take his remedy at the common law as in other cases. And with these things the ordinary, executor, or administrator, is not to intermeddle. But regularly a devisee cannot, nor may not, have or take any chattel real or personal devised to him, without the agreement or delivery of the executor or administrator. And by this assent, if the devise be good, (for otherwise an assent will not make it good) the devise is perfected, and the legacy executed. And yet if the legatee have the thing devised in his own hands; or if there be a special clause in the will giving him authority to take it himself; or it be a legacy to good and godly uses; or the thing given be like to perish on the ground, being corn or the like, and there Co. super Lit. 111. Perk. sect. 576. 578. 579. Swinb. 134. 135. Perk. sect. 570. Co. super Lit. 211. Plow. 525. 26 Edw. 4. 9. Swin. 353. Bro. tit. Devise 6. 30.

(1) Although the testator disposes of his goods or chattels, yet they all pass, not to the legatee, but to the executor, who has them in nature of a trustee for the legatee: the executor alone has a title in law to them, and the legatee cannot take any personalty bequeathed to him without the executor's assent; for, were it otherwise, it might be in the power of a legatee to subject an executor to a devastavit, which would discourage all persons from taking upon them the office of executor. *God. Orp. Leg.* 148.—*Went. Off. Ex.* 27.—The legatee may not take his legacy without the assent of the executors, or one of them, because the executors are charged to pay debts before legacies; and if one of the executors assent to pay legacies, he shall pay the value thereof out of his own purse, if there be not otherwise sufficient to pay debts, *Bac. Law Tracts* 163.

be affets beſides to pay all the debts; in theſe caſes perhaps the aſſent of the executor or adminiſtrator may not be neceſſary, but the legatee may take the thing deviſed without his agreement (1). And if a legacy be given to one of the executors themſelves, he may take it without any aſſent of his co-executors, and that before adminiſtration alſo if he will.

Perk. ſect. 572.

If there be many executors, the aſſent of any one of them is ſufficient * (2); and if there be but one, and he be dead, the aſſent of his executor is ſufficient: or if he die inteſtate, the aſſent of the adminiſtrator *de bonis non adminiſtratis* of the firſt teſtator is ſufficient; or the legatee himſelf in this caſe, where the executor dieth inteſtate, or where he doth refuſe to take upon him the adminiſtration, may take adminiſtration himſelf, and by public declaration aſſent to his own legacy. And if a man be executor and legatee both, he may aſſent to and take the legacy, and yet wave the executorſhip, and this aſſent is good. And therefore if the legatee of a term of years be made executor, and he enter, and claim, and occupy the land by force of the deviſe, and die before probate of the will: the executor of the legatee, and not the ordinary, ſhall have this term; and yet it ſeems the executor may not do this in prejudice of a creditor to hinder him of his debt.

* P. 456.

Dier 372. 367.

Co. 4. 28.

Any agreement in word or deed will ſuffice to make an aſſent and execute a deviſe. Let executors take heed therefore; for if an executor do but agree that the legatee of a term of years of land ſhall take the profits thereof, and that but for a time only, or ſay to the legatee, God ſend you joy of it! or I intend you ſhall have it according to the deviſe, or the like; this is a good aſſent to execute the legacy. And if the executor agree that the legatee and a ſtranger together ſhall take the profits of the land, or the thing deviſed; this is a good aſſent. And it ſeems that whatſoever verbal agreement will amount to an attornment, may make an aſſent to a legacy. If therefore the executor agree to the legacy upon certain terms and conditions; this is agreed to be a good and abſolute aſſent to the legacy (3).

A caveat for executors.

See Attornment.

Per 2 juſtices M. 37. 38 El. B. R. Co. 4. 28.

Plow. 540.

If a term of years be given to the wife of the teſtator, during the minority of his eldeſt ſon, to the intent that therewith the profits thereof ſhall breed up his children, the remainder of the ſame term to the ſame eldeſt ſon, and ſhe is made executrix, and ſhe enter generally, but doth always breed the children of the teſtator; in this caſe, it ſeems that this education of the children ſhall be taken for an aſſent againſt her to veſt the eſtate in the eldeſt ſon. And if a man poſſeſſed of a term of years give it to his wife, if ſhe live ſo long, and after her deceaſe the remainder of years to *I. S.* and make his wife executrix, and ſhe enter, claiming to have it only for her life, the remainder to *I. S.* according to the deviſe; in this caſe, this is a good aſſent for the execution of the remnant of the term in *I. S.* And if a term be deviſed to *A.* for life, the remainder to *B.* and the executor aſſent to the deviſe of *A.* in

Plow. 516. Perk. ſect. 574.

Co. 3. 95. 4. 66. 10. 47. Perk. ſect. 574.

(1) If teſtator *bequeath goods in the hands of* I. S. *to* I. S. yet the property is not transferred to *I. S.* without the executor's aſſent, though the executor has ſufficient for payment of the debts without them, and therefore executors may at the common law recover the thing or damages againſt the legatee. *Went. Off. Ex.* 221.—4 *Burn's Ecc. Law*, 3d edit. 301.

(2) See accordingly, *Went. Off. Ex.* 223.

(3) Accordingly, *God. Orp. Leg.* 144.

this case, this is a good assent to the devise of *B.* and shall execute the same also whether the executor have assets or not. So if a man, possessed of a term of twenty years, devise it to one for ten years, and after to another for the remnant of the term; or if the devise be to one for so * many years of the term as he shall live, and after to another for the rest of the time: in all these cases an assent to the first devisee is an assent to the second also. And so also it seems is the law of a chattel personal, when the occupation thereof is first devised to one, and then the thing to another. And if one that hath a term of years give it to his wife for her life, the remainder to his son, and make her executrix; and she enter claiming by force of the devise, and not as executrix: in this case, this is a good assent to execute the devise to him in remainder.

37 H. 6. 30. Plow. 519. 543. Co. 3. 96. 10. 47.

If one be possessed of a term of years of land, and he devise it to one of his executors alone for part of the time, and the remainder of the time after to a stranger; and that executor alone, albeit he enter generally, doth occupy the land himself, and the other executors do not intermeddle therewith: in this case, it seems, this is a good assent to execute the legacy to him in remainder for the rest of the term. And yet if one give goods to one of his executors for life, and after to a stranger for life, and this executor alone get the goods into his own hands, and occupy them alone all his life-time; it seems this occupation, without some assent, will not execute the gift in the second legatee.

Perk. sect. 574, 575. Fitz. Devise 6.

Dier 277.

If one possessed of a lease for years, devise it to his executors, and devise a rent out of it to *I. S.* and the executors pay the rent; this is a good assent to the whole legacy. But if he devise a rent, or common, out of it for certain years to *I. S.* and after devise the term to *I. D.*; and the executor doth agree that *I. S.* shall put in his cattle, or doth pay the rent to *I. S.* (which is a good assent to the legacy of *I. S.*;) this is no assent nor execution of the legacy of *I. D.* and yet perhaps if he devise a rent at first to *I. D.* for part of the term, and another rent to *I. S.* for the residue of the term afterwards; in this case, it seems that an assent to the first is not sufficient to perfect the devise of the second legatee. And yet if a termor devise the occupation or profits of his land to *I. S.* for ten years of his term, and after devise the land itself to *I. D.* for the rest of the term; in this case, if the executor assent to the legacy of *I. S.* this will be a good assent to and execution of the legacy of *I. D.*

Plow. 540. 544. Co. 3. 96. Plow. 542. 542. 522.

If one possessed of a term devise it to *I. S.* for life, the remainder to *I. W.* and make *I. S.* his executor, and *I. S.* take a release from *I. W.* of all his right to the land; this is an implicit assent to the legacy of *I. W.*

Co. 10. 52.

If a man devise the occupation of a book, or any other chattel personal to *I. S.* for that *I. S.* shall have the occupation of any such like thing during his life, and that after his decease it shall go to *I. D.* for ever, and the executor deliver the thing to *I. S.* it seems this is a good execution of the legacy to the second devisee *I. D.*; and * therefore after the death of *I. S.* he may seise the goods and hold them according to the devise (1).

Old N. B. 80. 37 H. 6. 30.

* P. 458.

(1) See more amply as to the doctrine of assent to a legacy, by whom, and in what manner, it may be made, and in what cases it is necessary, *Vin. Abr.* Devise (A. a.) to (E. a. 3.)—*Com. Dig.* Administration (C. 5.) Chancery (3 G. 4.)—*Bac. Abr.* Legacies (L).—Executors, &c. (L.)

If

* P. 457.

17. How a devisee may attain the thing devised: and what remedy he shall have to recover it, or damages for it.

17. How a deviſee may attain the thing deviſed: and what remedy he ſhall have to recover it, or damages for it.

Perk. ſect. 576, 577. 578, 579. Co. ſuper Lit. 111.

If lands or any rent, or other profit to be taken out of lands, deviſed to a man in fee-ſimple, fee-tail, for life, or years; in theſe caſes the deviſee may enter into, and have and take the thing deviſed, without the leave or agreement of the executor and adminiſtrator; and ſo he may, whether there be any executor made or not, and whether the will be proved or not, for the ordinary and the executor have nothing to do with theſe things. And if the deviſee in any ſuch caſe be diſturbed in the having or taking of ſuch things, he may have the ſame remedy as men have in other caſes. And where the land is deviſed by cuſtom, if the heir enter before the deviſee, the deviſee may be relieved by a writ called *Ex gravi Querela*; but if the deviſee enter firſt, and then the heir enter upon him, the deviſee may have his remedy at the common law.

Trin. 9 Jac. Lovet's caſe. Dier 151, 152.

If lands are given thus, I will that my executors ſhall ſell my land, and with the money made thereof ſhall pay ten pounds to my daughter *A.* and ten pounds to my daughter *B*; in this caſe, and for this gift, *A.* and *B.* may either ſue the executors in a court of equity, or have an action of accompt againſt them in a court of common law.

Dier 277.

If leſſee for years deviſe his term to executors for life, the remainder over to *J. S.* for the reſt of the term; and the executor entereth and doth aſſent to the legacy and die, and the executor of the executor doth take the profits of the land, and keep out the ſecond legatee; in this caſe, it ſeems he may have an accompt againſt the executor of the executor of the profits of the land. But if one deviſe his land to his ſon and his heirs (except twenty pounds a year for ſeven years to be employed as followeth), and doth appoint his ſon (being his executor alſo) to pay that money to his daughters for portions; in this caſe, the daughters may not have an accompt at the common law, but they may ſue the executors in the ſpiritual court, or in a court of equity, and if the executor be dead, they may ſue his executor.

Trin. 9 Jac. Lovet's caſe.

Dier 348.

If one deviſe a rent out of his land, and do charge the land with a diſtreſs, the deviſee may make uſe of that remedy and diſtrain for the rent: but unleſs power be given him by the will to diſtrain, he may not diſtrain for it.

Plow. 345.

If one be poſſeſſed of a term of years of land, and deviſe it to his wife, to the end that ſhe with the profits thereof ſhall breed up his children; in this caſe, this is no legacy to them, and therefore it ſeems they have no remedy but in chancery or ſome other court of equity againſt her, if ſhe refuſe to do it.

Fitz. Deviſe 6. Plow. 540. Perk. ſect. 574. 483. 20 Ed. 4. 9. Swinb. 735.

And in caſes of deviſes of goods and chattels, as leaſes for years, rents out of ſuch leaſes, and the like, the legatee cannot take the * thing deviſed before he have the aſſent of the executor or adminiſtrator thereunto; and therefore, if in theſe caſes the executor or adminiſtrator refuſe or agree to, perform, and deliver the legacy, the legatee may ſue him in the ſpiritual court, or in ſome court of equity, to compel him thereunto: but a legatee may not ſue for a legacy in any of the courts of common law (1), neither may he ſue the executor or adminiſtrator

* P. 459.

(1) Although the temporal courts do not directly take cognizance of legacies, ſo as to allow of an action for the recovery of them, yet may the executor make himſelf liable to an action at common law, as by his promiſe of payment, whereon an *aſſumpſit* will lie. *Sid.* 45.—*Str.* 1. *Raym.* 23.—A deviſee may maintain an action

ſtrator in the ſpiritual court for the legacy, until the will be proved; but he may by ſuit there compel him to prove the will, or to refuſe the adminiſtration: and in theſe courts, and by theſe means, the deviſee may recover his legacy againſt an executor or adminiſtrator; if he have aſſets to pay the debts of the teſtator; for otherwiſe a legacy is not recoverable at all; but in caſe where the executor or adminiſtrator hath once agreed to the legacy, ſo as it is executed, it is then ſo veſted in the legatee, and he hath ſuch a property therein, that he may enter into, or ſeiſe and take the thing deviſed as his own, and if any man keep or take it from him, he may have relief as in other caſes.

If another doth claim by deed of gift, the goods a legatee doth ſue for; this may be tried in the eccleſiaſtical court. 37 H. 6. 9.

If a debt, obligation, or any ſuch like thing in action be deviſed to another, the deviſee hath no means to recover it, but by a ſuit in the ſpiritual court, or in ſome court of equity, to compel the executor to ſue for it himſelf, or to make the legatee a letter of attorney, to ſue for it in the executor's name; for the legatee cannot ſue for it in his own name, unleſs he be made executor as to that debt, *&c.* (which is the beſt courſe in theſe caſes:) and yet if the legatee have the bond of eſpecialty in his hands, he may deliver it up or cancel it. Perk. ſect. 527.

If a man deviſe a term of years of land to *I. S.* and make another his executor, and the executor, having enough beſides to pay the debts, doth ſell this term; in this caſe, albeit the ſale be good, and *I. S.* have no remedy nor means to recover the term, yet he may ſue the executor for it, and recover the worth of it in damages in a court of equity (2). Plow. 543. 545. And of this opinion were Sir John Walter, and Sir John Bridgman upon deliberate advice.

And now having done with the firſt part of a teſtament, *viz.* a deviſe: we come to that which doth concern the ſecond part, *viz.* an executor.

18. What perſon may make or appoint an executor, and what not, and how.

Any perſon that may make a teſtament, and deviſe his goods and chattels, may make an executor. [a] And a woman that hath a huſband, as to the goods and chattels ſhe hath as executrix to another, and as to her own goods and things in action, *viz.* debts due unto her upon obligations, and eſpecialties made to her alone before, or after her marriage, may make an executor. [b] And he that may make an executor, may make either one, two, three, or more his executors at his pleaſure. And he may if he will make one man * his executor for one year, and another man his executor for another year; or one man his executor until ſuch a time, and then another his executor; as one may make *A.* and *B.* his executors, and that *B.* ſhall not meddle during the life of *A.* And a man may make one man executor for one part of his eſtate, and another man his executor for the other part of his eſtate; or one may make one man executor as to part of his eſtate, and die in- See before at Numb. 4. part. 1. a Fitz. Executor, 28. b Swinb. 187. D. er 4. Bro. Executors 55. 10 H. 8. 8. Lit. Bro ſect 180. 3. H. 6. 7. Swinb. 200. 193.

* P. 460.

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action at *common law* againſt a terre-tenant, for a legacy deviſed out of land; for where a ſtatute, as the ſtatute of wills, gives a right, the party by conſequence, ſhall have an action at law to recover that right *Holt* Ch. J.—2 *Salk* 415.

(1) The cognizance of a legacy properly belongs to the ſpiritual court, for ſuch bequeſts were not good at common law, the rule being *poſt mortem tunc tua non ſunt*.—But this muſt be underſtood where a legacy is diviſed generally; but if 'tis payable out of the land or out of the profits of the land, an action of the caſe lies at common law, but the uſual remedy is in chancery. 3 *Salk.* 223.—See further in what court, and in what manner, legacies are recoverable, in *Bac. Abr.* Legacies (M).—*Com. Dig.* Chancery (3 Y. 3).—4 *Burn's Ecc. Law* 301.—*Vin. Abr.* Deviſe (W d).—*Eq. Ca. Abr.* Legacies (I).

teſtate, as to the reſidue of his eſtate: alſo a man may appoint one to be his executor, if he will accept it; and if he refuſe, that another ſhall be his executor. And laſtly, a man may make another his executor upon condition, *viz.* ſo as he give bond to ſuch and ſuch men to perform his will, or the like; and all theſe nominations and appointments of executors are good.

See at numb. 4. part. 2. Numb. 7. Swinb. 222. Fitz. Executors 47. 87. Deviſe 3. & Fitz. Executor 11. 88. Non-ability. 18. Bro. Non-ability. 38. 3 d Co. 6. 67.

19. What perſon may be made or appointed an executor, and what not, and by what name.

Any perſon that may be a legatee, and take by the deviſe of goods and chattels, may be an executor: and therefore it is ſaid, that any perſon or perſons, male or female, of the clergy or laity, children or ſtrangers, friends or enemies, married or unmarried, creditor or debtor, bond or free, may be an executor. And that a baſtard, an excommunicate, or an outlawed perſon, may be as able and as abſolute an executor as any other. And an infant or child *in utero matris* may be an executor; but he cannot meddle with the adminiſtration of the goods until he be of the age of ſeventeen years; and therefore the ordinary muſt grant the adminiſtration unto ſome other until that time, in truſt and for the benefit of the infant. And a woman that hath a huſband may be an executrix to any other perſon. Alſo a woman may be executrix to her own huſband, and the huſband may be executor to his own wife, and by this means he may recover all the debts due to her upon obligations, recognizances, and the like, made to her before or after the marriage, and the goods that were taken away from her before the marriage: all which the huſband ſhall not have but by executorſhip or adminiſtration of her goods and chattels. And all theſe perſons that may be executors, may be executors by that name as they may be deviſees: and yet if there be two of one name, and the teſtator make one of that name his executor, and doth not ſay, neither can it be diſcerned, which of them he doth intend; in this caſe, neither of them ſhall be executor.

e Fitz. Executor 24. f Fitz. Executor 24. Bro. Conſultation.

Huſband and wife.

See before at Numb. 9. Swinburne.

Swinb. 222. 223. Co. 9. 39.

But it is ſaid, that an heretic, apoſtate, traitor, felon, recuſant convict, ſodomite, libeller, baſtard begotten in inceſt, or a notorious uſurer, cannot be an executor: and that if a man be for any of theſe cauſes incapable at the time of the death of the teſtator, when the executor is to take upon him the executorſhip, that he is for ever incapable: but it hath been held by the common law, that a perſon attaint may be an executor (1).

Bro. Non-ability 18. Fitz. Excommengement. 13. Swinb. part 4. ſect. 17. 13, 19. Dier 4. 19 H. 8. 8. 21 H. 6. 6. Fitz. Executor 43. Bro. Executors 98. 73. Fitz Executors, 113. 121. Brief 999.

* The moſt apt and proper words, whereby to conſtitute an executor, are, I make *I. S.* my executor; or, I make *I. S.* the executor of my will, &c. But an executor may be conſtituted by other words equivalent or by implication: and therefore, if a man ſay in his will, I will that *I. S.* ſhall be my general adminiſtrator; or I will that *I. S.* ſhall adminiſter all my goods; or I will that *I. S.* ſhall diſpoſe all my goods and chattels; or I commit all my goods to *I. S.*; or I commit all my goods to the diſpoſition of *I. S.*; or I make *I. S.* lord of all my goods; or I make *I. S.* legatary of all my goods; or I leave all my goods to *I. S.*; or I give all my goods to *I. S.* and make no other executor; in all theſe caſes, *I. S.* by intendment of law is made executor of all the goods and chattels of the deceaſed; ſo if a man ſay, of all my goods I make *I. S.* and ſay no more, but omit the word [executor], by theſe words *I. S.* is made executor: ſo if one ſay, I will that *I. S.* ſhall

* P. 461.

20. By what words a man may be made an executor, and what words in a teſtament ſhall make a man full executor, or not, but a co-adjutor or ſupervifor; and who ſhall be an executor by ſuch words.

(1) See more amply what perſons may be appointed executors, in 4 *Burn's Eccl. Law* 109.—*Bac. Abr.* Executors and adminiſtrators (A).—*Vin. Abr.* Executors (H. b.) (Q. b.)—*Com. Dig.* Adminiſtration (B. 2).

diſpoſe of all the goods that are in his hands, by theſe words *I. S.* as to thoſe goods is made executor: ſo if I deliver goods to *I. S.* to keep until my death, and then to diſtribute *ad pios uſus*, or for my ſoul, hereby *I. S.* is made executor of thoſe goods. So if one ſay, I will that *I. S.* ſhall be my executor, if *I. D.* will not; by this *I. D.* is made executor in the firſt place by implication, and if he refuſe, then *I. S.* ſhall be executor. But if a man make *A.* and *B.* his executors, and ſay, I will that *I. S.* ſhall be a co-adjutor, or helper to *A.* and *B.* *ad diſtribuendum* or *ad adminiſtrandum bona mea*; or I will that *I. S.* ſhall be ſurveyor, or ſuperviſor of my will; in theſe caſes, and by theſe words, *I. S.* is not made executor with *A.* and *B.* And yet if he ſay, I will that *I. S.* ſhall have adminiſtration of my goods; or be executor with *A.* and *B.*; or be adminiſtrator with *A.* and *B.*; in theſe caſes, and by theſe words, *I. S.* is made joint-executor with *A.* and *B.* And if one, ſuppoſing *I. S.* to be dead, ſay, I will that *I. D.* ſhall be my executor, becauſe *I. S.* is dead; in this caſe, and by theſe words, *I. S.* if he be living is made executor firſt; and if he refuſe, *I. D.* ſhall be executor: if one make *A. B.* and *C.* his executors, and then ſaith afterwards, and I will that *B.* ſhall adminiſter my goods alone, or that *B.* only ſhall adminiſter my goods; it ſeems, in theſe caſes, *B.* only is made executor, and that *A.* and *C.* are not made joint executors with him (1). 3 H. 6. 6. 7.

21. Where and in what caſe an adminiſtration is grantable, or not: and to whom it doth belong to grant it, and to whom it muſt be granted.

In all caſes where a man hath any goods or chattels to adminiſter, and he doth die a natural or civil death, and dieth inteſtate either in deed, *i. e.* doth make no will at all, nor appoint any executor; or in law, *i. e.* that doth make one or more his executor or executors, and he or they, ſo appointed, is or are ſuch perſons as are not in being, or if they be in being, is or are ſo incertainly named, that it cannot be diſcerned whom the teſtator doth intend; or, if he is or they be well named, he is or they are all incapable by * reaſon of ſome legal impediment; or if otherwiſe they be capable, they do all die before the will be proved; or if they live, if being cited to come in before the ordinary to prove the will, they either refuſe to appear, or, if they do appear, they refuſe to prove the will, and to take upon them the adminiſtration of the goods and chattels of the deceaſed; in all theſe caſes, the ordinary may and ought to grant the adminiſtration of all the goods and chattels of the deceaſed to him that of right it doth belong unto, according to his diſcretion: And if a man make a will, and, after the death of the teſtator, the executor prove it, and then die inteſtate, the ordinary muſt grant the adminiſtration of the goods of the firſt teſtator, not adminſtred in the hands of the executor to ſome competent perſon or perſons according to his diſcretion: but where a man hath no goods and chattels to adminiſter, *i. e.* either he hath none, or, if he have they are none of his, or if they are, there is an executor named, *in rerum natura*, capable, and well named, and he doth accept, or at leaſt hath not refuſed, the executorſhip; in theſe caſes, the adminiſtration ought not to be granted; or if it be granted, it will be void or voidable at the leaſt: and where an adminiſtration is grantable, it is to be granted by, and had from the ordinary of the dioceſs, where the party, whoſe goods are to be Co. 9. 39. Plow. 276. Doct. & St. 78. 132. Dier 236. 4 H. 7. 13.

* P. 462.

(1) See further by what words, and in what manner, a man may be appointed executor, in *Went. Off. Ex.* 8. —*God. Orp. Leg.* 82.—*Bac. Abr.* Executors, &c. (C. 1.)—*Com. Dig.* Adminiſtration (B. 1.)

Stat. 31 Ed. 3. chap. 11. 21 H. 8. c. 5. Fitz. Adminiſtration 7. Lic. Bro. ſect 276. See infra numb.

adminiſtred, lived at the time of his death; for regularly he that ſhall have the probate of a will, in caſe where a man doth make a will, ſhall have the granting of the adminiſtration of his goods and chattels, in caſe he die inteſtate: and therefore if all the goods and chattels of the party deceaſed be within the ſame dioceſs wherein the inteſtate lived and died; the ordinary of that dioceſs, or his lawful deputy, or commiſſary, or the arch-deacon of the dioceſs, or his deputy or official (as the cuſtom of the country is) or the dean and chapter in time of vacation of the biſhoprick, ſhall grant the adminiſtration, and the adminiſtration be had from him: but if there be *bona notabilia* in the caſe, *Bona notabilia.*

Co. 5. 29. 30. Dier 305. F. N. B. 120. Plow. 277. 281. Co. 6. 18. 19. Dier 339. See infra at numb.

viz. if the party deceaſed have goods or chattels of the value of five pounds or upwards, lying and being at the time of his deceaſe in divers dioceſſes; in this caſe, the archbiſhop or metropolitan of the dioceſs wherein the party died, or, *ſede vacante*, the dean and chapter being guardian of the ſpiritualties, and not the ordinary of the particular dioceſs, ſhall grant the adminiſtration; and it muſt be had from him; for if the ordinary of the particular dioceſs grant it when it ought to be granted by the metropolitan, the adminiſtration is void, not only as to the goods that lie within the other dioceſs, but alſo as to the goods lying within the ſame dioceſs: and ſo is it alſo, if it be granted by the ordinary of another particular dioceſs, as if *A.* die within the dioceſs of *Lincoln*, the King being indebted to him at the the time of his death, and the adminiſtration of his goods and * chattels is granted by the biſhop of *London*; this adminiſtration * P. 463.
is void: and if the metropolitan do grant an adminiſtration, when it ought to be granted by the ordinary of the particular dioceſs, the adminiſtration is voidable by ſentence of the ſame

Dier 305.

court out of which it is granted: if one die in *Ireland*, and have nothing but an eſpecialty for money, and that eſpecialty doth lie in *England*, the ordinary of the dioceſs, within which that place is where the eſpecialty doth lie, ſhall commit the adminiſtration; and if the ordinary of another dioceſs grant it, the adminiſtration is void: and therefore the caſe was, a merchant in *Ireland* was bound in an obligation of forty pounds to one *I. S.* in *London*, and the obligation was made in *Ireland*, but remained always in *London*, and the merchant died inteſtate in the county of *Bedford* in *England*, and a biſhop of *Ireland* did commit the adminiſtration to one, and the archbiſhop of *Canterbury* did commit it to the wife of the inteſtate who had the obligation: in this caſe, the laſt adminiſtration was adjudged good: and it was there held, that the adminiſtration ſhall be granted by the ordinary of the place, where the eſpecialty doth lie at the time of the death of the inteſtate, and not by the ordinary of of the place where the debt began. And in caſes where the

Stat. 31 Ed. 3. c. 11. 21. H. 8. c. 5. Lit. Bro. ſect 233. 415. Fitz. Excommengement, 13. Co. 9. 39. 40. 3. 40. Dier 339. 4 H. 7. 14.

adminiſtration is grantable by the ordinary and others as before, ſuch perſons, having power to grant it, may not grant it to whom they pleaſe; but as they are bound to grant it, and cannot refuſe ſo to do, ſo are they directed and appointed to whom they ſhall grant it: For it is appointed by a ſpecial law, that the ordinary ſhall depute the next friends of the inteſtate to adminiſter his goods if they deſire it: and the adminiſtration is to be committed to the widow, or next of blood, or both, to the inteſtate; and where there there be divers in equal degree, and they all ſue for it, the ordinary may accept them all, or refuſe

ſome

ſome of them, and commit the adminiſtration to the reſt only; and if ſome of them only ſue for it, he may grant it to them alone: ſo that now the law and courſe is to grant the adminiſtration to the neareſt of kin to the deceaſed; as 1. to the huſband or wife; and, if there be none ſuch, 2. to the children, ſons or daughters; and if there be none ſuch, 3. to the parents, father or mother; and if there be none ſuch, 4. to the brothers or ſiſters of the whole blood; and if there be none ſuch, 5. to the brothers or ſiſters of the half blood (1); and if there be none ſuch, 6. to the next of kin, uncles, &c. And if theſe come in time and deſire the adminiſtration, the ordinary may and muſt grant it to them, and cannot grant it to any other if they be capable of it, as moſt men are; and if divers of theſe in equal degree deſire it, the ordinary may grant to which of them he pleaſeth; howſoever, in this caſe, it ſeems moſt juſt and equal to grant it to them all, unleſs he have ſome * ſpecial reaſon to admit ſome and exclude the reſt: and if none of theſe that are next of kin ſhall deſire it; but ſuffer the time to ſlip; in this caſe the ordinary may grant it to whatſoever ſtranger he pleaſe (2). And yet then perhaps the next of kin may by ſuit get the ſame adminiſtration revoked, and a new adminiſtration granted to him. See *infra* at *numb.* 41 (3).

* P. 464.

22. How an adminiſtration may be granted, and what ſhall be ſaid a good adminiſtration, or not.

An adminiſtration may and muſt be granted in writing under ſeal, for by word of mouth it may not be granted; and it may be granted as well upon condition as abſolute: and it may be granted as well for a part of the eſtate as for the whole: and therefore, if a man have goods in two provinces, and he make a will of his goods in one of the provinces, and die inteſtate for the goods in the other province, an adminiſtration may be granted for the goods in this province: alſo an adminiſtration may be granted during, or until a certain time, or continually. And therefore, if a man make a will, and appoint an executor for ſeven years, after the ſeven years ended, the ordinary may and muſt grant an adminiſtration of the goods. So if one do appoint another to be his executor, a year after his death, the ordinary may and muſt grant the adminiſtration for that year, until the power of the executor doth take place: and all theſe adminiſtrations are good (4). Dier 294. Fitz. Adminiſtrator 5. 34 H. 6. 14. Plow. 279.

23. Who ſhall adminiſter after the death of an executor or adminiſtrator, and who not; and how an ex cutor of an executor ſhall charge and be charged.

If an executor die after he hath proved the will, and he hath made a teſtament, and appointed an executor therein; in this caſe, this executor alſo ſhall be executor to the firſt teſtator, as he is to the ſecond, and he ſhall have all the benefit, and be ſubject to all the charge that the firſt executor had and was ſubject unto; and yet the goods of one teſtator ſhall not be ſubject to the debts of the other; but each of the teſtator's goods ſhall be ſubject to the payment of his own debts only. [a] And if in this Stat. 25 Ed. 3. c. 4. Co. 5. 9. Plow. 286. 34 H. 6. 14. a Trin. 17 Jac. Co. B. Wolf and Heiden's caſe.

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(1) The half blood is admitted to the adminiſtration as well as the whole, for they are of the kindred of the inteſtate, and only excluded from inheritances of land upon feodal reaſons. Therefore the brother of the half blood ſhall exclude the uncle of the whole blood; and the ordinary may grant adminiſtration to the ſiſter of the half or the brother of the whole blood, at his own diſcretion, 2 *Black. Com.* 505.—*Aleyn.* 36.—*Styl.* 74.—See alſo *Went. Off. Ex.* laſt edit. 130.—*God. Orp. Leg.* 261.

(2) Or may grant him letters *ad colligendum bona defuncti*, which neither make him executor nor adminiſtrator; his buſineſs being only to keep the goods in his ſafe cuſtody, and to act for the benefit of thoſe who are entitled to the property of the deceaſed, 2 *Bl. Com.* 505.

(3) See more amply what perſons are intitled to take out adminiſtration, and how they are to be preferred; in, *God. Orp. Leg.* 259.—*Stat.* 22 & 23 *Car.* 2. *c.* 10.—29 *Car.* 2. *c.* 3.—*Bac. Abr.* Executors, &c. (F.)—4 *Burn's Ecc. Law* 221. 3d edit.—*Com. Dig.* Adminiſtrator (B. 6.)

(4) See further in what manner adminiſtration muſt be granted in *Bac. Abr.* Executors (G).—*Com. Dig.* Adminiſtrator (B. 7.)

caſe,

caſe, the executor of the executor take upon him the adminiſtration of the goods of the firſt teſtator, he cannot refuſe the adminiſtration of the goods of the latter: but he may take upon him the latter and refuſe the former. But if the executor refuſe to adminiſter to the firſt teſtator before the ordinary, or die before the probate of the will, and he hath made a teſtament and appointed an executor therein; in theſe caſes, it ſeems the executor of the executor ſhall not adminiſter the goods of the firſt teſtator, but the ordinary muſt grant the adminiſtration thereof: and yet if all the reſidue of the goods of the firſt teſtator be given by the teſtament to the firſt executor after the debts be paid; in this caſe, albeit he die before probate of the will, yet his executor ſhall be executor alſo to the firſt teſtator, or elſe he ſhall have the adminiſtration of his goods and chattels granted unto him: and therefore, if *A.* make his will, and give legacies to *B.* and *D.* and give all the reſt of his goods and * chattels, after debts and legacies paid, to *C.* his wife, and make her his ſole executrix, and ſhe die before probate of the will, or any election made, not knowing of the will, and *E.* ſue out an adminiſtration of the goods of *A.* and pay the legacies to *B.* and *D.* and *F.* ſue out an adminiſtration of the goods of *C.*; in this caſe, the adminiſtrator of *C.* and not of *A.* ſhall have the goods; for the law doth judge them in *C.* after the debts and legacies paid without any election.

Dier 372.

Adjudged in Hil. 9. Car. in Den's caſe.

* P. 465.

If an executor, after he hath proved the teſtator's will, die inteſtate; in this caſe, the adminiſtration of the goods of the firſt teſtator not adminiſtred in the hands of the executor muſt be granted to whom the ordinary ſhall think fit: and if the ordinary pleaſe, he may grant the adminiſtration, *de bonis non adminiſtratis* of the firſt deceaſed, and of the goods of the ſecond deceaſed, to one and the ſame perſon: and herein the adminiſtrator muſt take care that his adminiſtration have ſpecial words for the granting of an adminiſtration of the goods of the firſt teſtator, not adminiſtred; for howſoever ſome hold that, by the general adminiſtration, the adminiſtrator ſhall have not only the goods of the executor, but the goods of his teſtator alſo, yet it ſeems this is not taken to be law at this day.

Bro. Executor 117. 26 H. 8. 7. Co. 1. 96. Dier 372. Terms of the Law, tit. Adminiſtration.

Fitz. Adminiſtrator 9.

If there be two executors made, and one of them doth refuſe before the ordinary, and the other doth prove the will, and make a will himſelf and appoint an executor and then die; in this caſe, it ſeems the executor of the executor that did prove the will alone ſhall have the diſpoſition of all the eſtate, and be executor to the firſt teſtator; and that the ſurviving executor ſhall not meddle therewith, for that his election by the death of his companion is gone. And if one make two executors, and one of them doth make an executor and die, and the other that doth ſurvive hath accepted the executorſhip; in this caſe, the ſurviving executor ſhall have the ſole diſpoſing of the eſtate, and the executor of the deceaſed executor ſhall not intermeddle therewith: and if therefore the ſurviving executor die inteſtate, an adminiſtration *de bonis non adminiſtratis* of the firſt teſtator ſhall be granted: and if the executor of the deceaſed executor have any of the eſtate in his hands, the ſurviving executor may take or recover it from him: and if two be made executors, and one of them is incapable; in this caſe, he that is capable ſhall adminiſter alone.

Dier 160.

Lit. Bro. ſect. 179. Bro. Executor 149. 99. Fitz. Executor 12. 113. Dier 187.

If one that is administrator of another man's goods do make his will and make an executor and die, or do die intestate, and the administration of his goods granted to some body; in the first of these cases the executor, and in the last the administrator, unless he be made administrator of these goods also, shall not meddle with the goods of the first deceased: but the administration of the goods of the first deceased in the hands of the administrator not administered, must be granted again. And hence it is, that if the administrator of my goods have a judgment for a debt due to me, and he die before execution, and make an executor, or die intestate, that, in this case, his executor or administrator shall never have execution of this judgment. And the same law is of the administrator of my executor in this case.

Dier 372. 112. Co. 5. 9.

* P. 466.

See the cases before.

24. Where an executor or administrator may accept or refuse the executorship or administration, and how: and where he may be executor after he hath refused, or not: and what act or intermedling with the goods of the dead shall be said an administration, and what not.

An executor or administrator may accept or refuse the executorship or the administration at his pleasure; and therefore he may at any time before he hath intermeddled with the estate as executor or administrator, refuse it; and if he be sued by any as executor or administrator, he may plead, *ne unques executor*, *i. e.* he was never executor or administrator, and did never administer; and if it be true, he shall by this means avoid the suit; for a man shall not be compelled to take such a charge upon him whether he will or no. If therefore there be many executors, or an administration be granted unto many: and one of the executors prove the will in the name of the rest, or one accept the administration in the name of all the rest, yet the rest may refuse to accept it, and plead in any suit against them that they are not executors or administrators. But as an executor or an administrator, after he hath once legally refused the executorship or administration, can never after intermeddle therewith: so after he hath once legally accepted thereof (that is) hath done any thing as executor or administrator, and which is proper only for an executor or administrator to do, he can never after refuse it. And his acceptance of part, in this case, will make him chargeable with all, except it be in the case before, of an executor, who may accept of the last executorship, and refuse the first.

Co. 9. 37. 37 H. 6. 27. 28. 20 H. 6. 1.

If the executors, being cited to come in and prove their will, appear before the ordinary, and refuse to administer and to prove the will, they cannot afterwards accept it or intermeddle with it. But herein this difference must be observed; that where there be many executors named and made, and they being cited, some of them only do appear and refuse to accept it (the rest of the executors being then living) and after some or one of the rest of the executors prove the will, or take upon him the executorship; in this case, and notwithstanding this refusal, they that do refuse may afterwards at any time, at least during the life-time of their co-executors that did accept it, accept thereof, and intermeddle therewith as far forth as either of the rest. And therefore, in this case, howsoever the executors refusing shall not be charged in any suit against all the executors for any thing due from the testator, but they may by their plea avoid it; yet the executors accepting cannot sue for any * thing due to the testator, nor be sued for any thing due from the testator, but they must sue and be sued in the names of themselves and their co-executors that do refuse also. And if there be three executors,

Co. 9. 37. Fitz. Administration 6. 11. Bro. Administration 32. Executors. 117. Co. 5. 28. Perk. sect. 485. Dier 160. 21 Edw. 23.

* P. 467.

executors, and two of them prove the will, and the third refuse; yet this third executor alone may release any debt due to the testator. But if there be but one executor made, and he alone, or if there be many made, and they do altogether refuse before the ordinary to take upon him or them the administration; in this case, the testator is so far forth said to be dead intestate, and thereupon therefore the ordinary may grant the administration of the goods of the deceased, and then the executor or executors can never after accept thereof, or intermeddle therewith. And if one or more of the executors refuse, and the rest accept, if he or they which accept die before he or they that refused accept; it seems in this case they can never afterwards accept it, but the administration must be granted.

See the cases before.

If one be sued as executor or administrator, and he plead to the suit *ne unques executor*, *i. e.* he was never executor or administrator, if he have not in truth intermeddled before; this plea is a refusal of the executorship or administration, and therefore he can never afterwards accept or intermeddle with the executorship or administration.

Co. 9. 37. 5. 34. Dier 105. Kelw. 63. Bro.

Every intermeddling with the goods of the deceased, or with the office and work of an executor, shall not be said to be such an administration as to amount unto an acceptance of the executorship or administration, and so to make a man chargeable as executor or administrator. And therefore if a man that is an executor or administrator do only lay up and preserve the goods of the deceased; or command another to take away the goods of the deceased from one that hath them in his keeping; or see the deceased buried in a decent manner, and for that purpose use, and if need be sell, some of his goods to do it; or make an inventory of the goods and chattels of the deceased; or prove the testator's will with his own money; or take his own goods lying amongst the goods of the deceased; or take and use some of the goods of the deceased only by mistake, or as a trespasser, or by the delivery of another; or take and dispose any of the goods of the deceased, when the executor or administrator doth challenge them as his own, and in his own right; or if he redeem any of the goods of the deceased with his own money when they are pledged to the full value, and the day of redemption is past; as neither of these acts will make a stranger an executor of his own wrong, so neither will they amount to an acceptance of the executorship, and make the executor or administrator chargeable as executor or administrator (1). But if a man that is an executor or administrator shall sue by that name for any debt due to the deceased; or being sued * by that name for any debt or duty due from the deceased, shall imparl to the suit, or plead any other plea besides *ne unques executor*; or shall take into his hands the goods of the deceased, and convert them to his own use, and alter the property by sale, gift, or otherwise, and all this as the goods of the deceased; (and so it shall be intended against him if he do not declare the contrary, that he doth take and use them as his own, &c.) or if he deliver the goods of the deceased to creditors or legataries in satisfaction of their debts or legacies; or

Administrator 35, 36. Fits. Administrator 7. Bro. Executor 165. 32 H. 6. 6. Dier 135.

Executor of his own wrong.

* P. 468.

(1) See fully what act or degree of intermeddling will make any one an executor *de son tort*, what remedy may be had against him, and what acts of his shall be valid, in *Went. Off. Ex.* 172.—*Swinb.* 337.—*God. Orp. Leg.* 90.—*Bac. Abr.* Executors, &c. (B. 3.)—and *post.* numb. 33.

receive any debt due to the deceased, and give a release for the same; or release any debt due to him before it be paid; or pay any debt due from the deceased, except it be with his own money; any or either of these acts will amount unto an acceptance of the executorship; and therefore after an executor or administrator hath done any such act, he can never after refuse the executorship or administration.

If a woman sole be made an executrix to another, and she marry a husband before she intermeddle with the estate, and then her husband doth administer; this is such an acceptance as will bind her, and she can never afterwards refuse it. Bro. Executor 147.

§5. What things an executor or administrator shall have by virtue of his executorship or administration, and what not.

First in respect of the nature of the thing.

The executor or administrator shall have by virtue of his executorship or administration all the chattels real and personal of the testator, as well those that are in possession, as leases for years of land, rent, common, or the like, grants of next advowsons, and presentations, wardships of heirs by reason of tenures *in capite*, or Knight's service, corn growing and cut, trees, and grass cut and severed, cattle, money, plate, household-stuff, and the like; as also those that are in action, as right and interest of executions upon judgments, statutes, obligations, causes of action, and the like; he shall have also all other things that are of the nature of chattels. [b] And therefore the executor or administrator shall have the two years of the heir female that is in ward; a relief or an advowson that is fallen; and yet if a bishop have title to present by the vacation of a church, and then he die; in this case, the King, and not the executor or administrator of the bishop, shall present. And if the Lord have a greater estate in the seigniory than for life or years, it is said the executor or administrator shall not have the relief. And the executor or administrator of the Lord shall have fines assessed upon the tenants upon their admittances in the Lord's time. [c] And if I make a feoffment in fee, gift in tail, or lease for life, rendering rent, and the rent is behind, and then I die; in this case, the arrearages of rent due to me in my life-time shall go to my executor or administrator in the nature of a chattel. So if a rent be granted out of land to me in fee-simple, fee-tail, for life, or years, and it be not paid to me in my life-time; these arrearages shall go to my executor, or administrator, and not to any * other. [d] And so also if a parson have an annuity in fee in the right of his church, and it be behind, and the parson die; in this case, the executor or administrator, not the successor of the parson, shall have the arrearages. [e] And if I be seised of land and possessed of a stock of cattle, and let it to another for years, and he covenant by the lease to pay me and my wife, our heirs and assigns, one hundred pounds by the year, during the term; in this case, after my death, and my wife's surviving me, her executor or administrator, and not my heir, shall have this payment. [f] And if one seised of land in fee, make a feoffment of it to me, excepting the trees, and after grant me the trees for years; or if he make me a lease of the land first for years, and after doth grant me the trees for a number of years, to begin after the end of the term of the land; in both these cases, I have the trees in the nature of a chattel, and if I die my executor or administrator shall have them. [g] And if a man grant to me the next presentation to the church of *D.*; in this case, if I die, my executor or administrator shall have it as a chattel. [h] And my wife shall have so much

* P. 469.

b Co. super Lit. 209. 388. Perk. sect. 60. Plow. 293. Doct. & St. 39. 76. Perk. sect. 833. Co. 4. 65. 63. 7. 27. Kelw. 118.

b Co. super Lit. 79. Dier 140. 283. Dier 24. Bro. Executor 143.

c Stat. 32. H. 8. c. 37. Co. 4. 48. Dier 575.

d F. N. B. 120. l.

e Dier 275.

f Co. 4. 63.

g Dier 283. 34 H. 6. 27.

h See supra at numb. 7.

of

of her wearing apparel, as is neceſſary and convenient for one in her eſtate and condition; and therefore that ſhall not go to my executor. But ſo much of her wearing apparel as ſhe hath ſuperfluous, and more than neceſſary for her, ſhall go to my executor or adminiſtrator after my death (1). And the charters and evi-
i Prov. Chattels 12. dences, that do concern any of my chattels which my executor or adminiſtrator is to have, ſhall go with the ſame chattels. So alſo any charters whatſoever, if they be pledged to me for money, ſhall go to my executor or adminiſtrator until the money be paid. But otherwiſe thoſe deeds and evidences, that do belong to the heir as incident to the inheritance, ſhall not go to my executor or adminiſtrator after my death. But matters of truſt, and ſuch things as are perſonal, as offices of truſt, wardſhips by reaſon of a tenure in ſocage, or *jure naturæ*, or the like, ſhall
Plow. 293. Co. 8. 39. 9. 99. Kelw. 218. See before at Numb. 7. not go to the executor or adminiſtrator after the death of him that hath them. So an executor or adminiſtrator ſhall not have the graſs and trees growing on the ground, no more than the ſoil or ground itſelf whereon they grow. So an executor or adminiſtrator ſhall not have the incidents of a houſe, as glaſs, doors, wainſcot, and the like, no more than the houſe itſelf; nor pales, walls, ſtaulks, fiſh in ponds, deer, or conies in parks, pigeons in pigeon houſes, or the like.

Co. 10. 87. Lit. ſect. 740. Fitz. Accompt 56. F.N.B. 110. If a leaſe for years of land be granted to me and my heirs, or to me and my ſucceſſors, and I die; my executor or adminiſtrator, and not my heir, ſhall have this term. The ſame law is, if a wardſhip, or the next advowſon of a church, be granted unto me and my heirs; or if a covenant or an obligation be made to me and my heirs: for in all theſe caſes this is ſtill a chattel in me, that ſhall go to my executor or adminiſtrator, and he only ſhall take advantage of it. And if my heir or ſucceſſor happen to get the deed, the executor or adminiſtrator may recover it from him. And if a leaſe be made to me for twenty years, without naming my executors or adminiſtrators or aſſigns in the leaſe; in this caſe, if I die, my executor or adminiſtrator notwithſtanding ſhall have it during the term. And if a leaſe for years be made to a biſhop and his ſucceſſors, and he die; his executor or adminiſtrator, not his ſucceſſor, ſhall have it. And if a man be poſſeſſed of a term of years of land, and grant it by deed, or give it by will, to me and my heirs, or to me and my heirs male; or deviſe it by will to *A.* for life, the remainder to me and my heirs; in theſe caſes, I ſhall have theſe terms of years as chattels, and after my death my executor or adminiſtrator ſhall have them. And if a man grant a rent out of his land to me and my heirs for twenty years, and I die; my executor or adminiſtrator, not my heir, ſhall have this rent. And if a rent be granted to me, my heirs and executors, during the life of *J. S.* and for one half year after, and I die; in this caſe, the

Secondly, in reſpect of the caſe.

* P. 470.

g New terms of the law, tit. aſſigns. h Co. ſuper Lit. 46. Co. 8. 95. 10. 87. Plow. 524. h Lit. ſect. 470. i M. 7. Jac. Co. B. Wat's caſe. Lit. ſect. 739.

(1) The wife after the death of her huſband ſhall have convenient apparel for her body, not the executors of her huſband; and of this convenience the court muſt be the judge. But ſhe ſhall not have exceſſive apparel; and if ſhe takes more than is convenient, ſhe ſhall be taken to be an executor of her own wrong.—4 *Burn's Ecc. Law* 246. which cites 1 *Roll. Abr.* 911.—*Law of Teſt.* 383. ——— *Bona paraphernalia* are not deviſable by the huſband from the wife, any more than her looms from the heir; ſo that the right of the wife to the *bona paraphernalia* is to be preferred to that of a legatee—ſaid Lord Chancellor *Macclesfield*, in *Tipping* v. *Tipping*, 1 *Pr. Wms.* 729.—See more amply what things are included in the *bona paraphernalia*, and how far the widow is juſtified in retaining, or enabled to recover them, *Com. Dig.* Baron and Feme (F. 3.)—*Bac. Abr.* Executors (H. 4.)—2 *Black. Com.* 436.—1 *Wood* 136.—*God. Orp. Leg.* 130.—*Vin. Abr.* Executors (Z. 5.)

half years rent ſhall go to my executor or adminiſtrator, and not to my heir. And if I be ſeiſed of land in fee, and make a leaſe for years of it rendering rent, and then deviſe this rent to a ſtranger, and the deviſee die; in this caſe, his executor or adminiſtrator ſhall have it. And if the leſſee for life make a leaſe for years abſolutely; this in law is a leaſe for ſo many years if the life ſo long live, and ſhall go to the executor or adminiſtrator after his death. Dier 5.

If I have a box, cheſt, or trunk, wherein my writings that do concern my inheritance do lie, and the ſame is open, and not ſealed or locked: in this caſe my executor ſhall have it; but if it be locked or ſealed, *contra*: for then it ſhall go to him that is to have the writings as incident thereunto. And yet if there be any money, plate, or any other ſuch like thing in the cheſt alſo; my executor ſhall have that thing. Co. 7. 12. Bro. Executors 145. 97. Fitz. Executors 111.

The incidents of a houſe, as glaſs-windows annexed with nails or otherwiſe to the windows, the wainſcot fixed by nails, ſcrews, or irons put through the poſts or walls, tables dormant, furnaces of lead and braſs, and fats in a brew and die houſe ſtanding and faſtened to the walls, or ſtanding in or faſtened to the ground in the middle of the houſe, (though faſtened to no wall,) a copper, or lead fixed to the houſe, the doors within and without that are hanging and ſerving to any part of the houſe, ſhall not go to the executor or adminiſtrator to be divided and ſold from the houſe, albeit the executor or adminiſtrator have a leaſe for years of the houſe, and by that means hath the houſe alſo. But if the glaſs be from the windows, or there be wainſcot looſe, or doors more * than are uſed that are not hanging, or the like: theſe things ſhall go to the executor or adminiſtrator. Co. 4. 63. 22 H. 7. 26.

* P. 471.

If I make a feoffment to *I. S.* of land, on condition that if he pay me, my heirs or aſſigns, or my heirs, executors or adminiſtrators, a hundred pounds ſuch a day, that the feoffment ſhall be void, and I die before the time of payment; in this caſe, if this money be paid at the day, my executor or adminiſtrator, and not my heir, ſhall have it. Co. 5. 96. Fitz. Executor 8.

If one be ſeiſed in fee of lands whereon there are trees growing, and he make a feoffment of the land to me, excepting the trees, and afterwards he doth ſell me the trees for ever, and after I die; in this caſe, my executor or adminiſtrator ſhall not have theſe trees, as they ſhall in caſe where the feoffor doth grant them to me for years. And if I be ſeiſed of land in fee, and I make a leaſe for life, or years of it, excepting the trees, and afterwards I die; in this caſe, my executor or adminiſtrator ſhall not have theſe trees, but they ſhall go in both caſes with the land. Co. 4. 63. 11. 48.

If a leaſe be made for life, or years, of land, whereon a houſe is ſtanding, or timber is growing, and the houſe is proſtrate, or the timber is cut or fallen down (by whomſoever or what means ſoever it be;) the materials of this houſe, and this timber, is now become a chattel; and therefore, if the leaſe be without impeachment of waſte, it ſhall go to the leſſee, and after his death to his executor or adminiſtrator; but if the leaſe be otherwiſe, it ſhall go to the leſſor, and after his death to his executor or adminiſtrator. But if the timber be cut for reparations only, or the leſſee will employ the materials of the houſe to build it again, and the leaſe do continue, it may be ſo employed, and then the executor or adminiſtrator of the leſſor may not take it. Co. 4. 63. 11. 81. 84.

If

Co. 11. 50. Perk. sect. 58.

If one be seised in fee-simple of ground whereon trees do grow, and he sell me these trees for money, and afterwards I die before they be cut; in this case, my executor or administrator shall have and may cut them.

Co. super Lit. 388.

If the King's tenant by Knight's service *in capite* be seised of a manor whereunto an advowson is appendant, and the church become void, and the tenant dieth, his heir within age; in this case, the King, and not the executor or administrator of the tenant, shall have the presentation. And yet if in this case the land be held of a common person, the executor or administrator, and not the guardian, shall have it.

Dier 316. Doct. & St. 35. Perk. sect. 59.

In all cases regularly where a man doth sow land, whereof and wherein he hath such an estate as may perhaps continue until the corn be ripe, if he that doth sow it die before it be cut and severed, his executor or administrator shall have it: as if the husband sow the land whereof he hath an estate in fee-simple, fee-tail, for life, * or for a certain number of years, in the right of his wife, and die ere it be ripe; in this case, the executor or administrator of the husband, and not the wife, shall have it. And if one that holdeth land for the life of *J. S.* sow the land, and *J. S.* die ere it be ripe and cut; the executor or administrator of the tenant shall have this corn. And if tenant in tail, or in dower, sow the land they do so hold, and die ere it be cut; the executor or administrator, not the issue in tail, nor the heir, or him in reversion, shall have it. So if the husband make a feoffment in fee to the use of himself for life, and after of his wife, &c. and he sow the land, and after die; his executor or administrator, not his wife, shall have the corn. But if a feoffment be made to the use of the husband and wife together in fee, or for life, and the husband sow the land; in this case, the wife, not the executor or administrator of the husband, shall have the corn. So if lessee for years certain sow the land a little before the end of his term, and the term end before it be cut; in this case, he that is to have the land, not the executor or administrator of the lessee for years, shall have the corn (1).

* P. 472.

Co. 2. 93.

If there be tenant for life, the remainder in fee of a tenancy, and the Lord grant his seigniory for life, and after he in remainder in fee of the tenancy die, his heir within age, and after the Lord die, and after the tenant for life die; in this case, the heir, and not the executor or administrator of the Lord, shall have the wardship.

Hil. 7 Jac. B. R. per Curiam.

If one be seised of land in fee, and make a lease for years rendering rent at *Michaelmas*, or within ten days after, and the lessor happen to die during the term after *Michaelmas*, and before the ten days expired; in this case, the heir of the lessor, and not his executor or administrator, shall have the last half year's rent due at *Michaelmas*.

F.N.B. 120. Fitz. Covenants 17. Dier 24.

If one grant a rent in fee, and grant withal that, if the rent be behind, the grantor shall forfeit twenty shillings *nomine pœnæ* to the grantee and his heirs, and the rent is behind, and the grantee die; in this case, his executor or administrator, not his heir, shall have this money that is forfeit already. So if one make a feoffment in fee of land, and the feoffee doth covenant to do divers things to the feoffor, *et quoties defectus fuerit*,

(1) See before, as to the doctrine of emblements, in fo. 243 & 414 and the references in the notes thereunto respectively.

&c. that he ſhall forfeit to him and his heirs five pounds, and the feoffee doth fail and break his covenant divers ways, and the feoffor dieth; in this caſe, his executor or adminiſtrator, not his heir, ſhall have and recover all the forfeitures that are paſt.

If a Biſhop, Parſon, Vicar, Maſter of an hoſpital, or any body politic be poſſeſſed of any goods or chattels in their own right and die; theſe ſhall go to the executor or adminiſtrator, and not to the ſucceſſor, of ſuch a perſon. And albeit ſuch things be granted to * them and their ſucceſſors, yet their executors and adminiſtrators, and not their ſucceſſors, ſhall have it. But if a corporation aggregate, as Dean and Chapter, Mayor or commonalty and the like, have any goods or chattels in right of their corporation, and any of the heads or members thereof die; the executors or adminiſtrators of ſuch perſon ſhall not have them: but they ſhall continue in ſucceſſion with the corporation.

Co. 4. 65. Perk. 526. 58. Co. ſuper Lit. 46.

* P. 473.

An executor or adminiſtrator ſhall have the benefit of a pardon granted to the deceaſed, and ſhall have advantage of any error in any outlawry againſt the deceaſed, and have reſtitution of the goods forfeit thereupon,

Co. 6. 8a. Dier 201.

Huſband and wife.

The executor or adminiſtrator of a woman that hath a huſband, ſhall have, by right of his executorſhip or adminiſtration, all actions, rights, and titles to any chattels, and poſſibilities, and things of that nature, which the wife had before the marriage, and which fell to her during the marriage; for theſe things the huſband ſhall not have by the intermarriage after his wife's death, as he ſhall have all the reſt of her goods and chattles: except he have them as executor or adminiſtrator to her, as he may be. And if ſuch a woman have any goods or chattels as executrix to another, her executor or adminiſtrator, not her huſband, ſhall have theſe alſo; for ſhe hath theſe goods in another's, and not in her own right.

Co. ſuper Lit. 351. Plow. 294. 192.

If I have any goods or chattels in joint-tenancy with another, as if a leaſe be made of lands to me and another for years, or a horſe or other chattel perſonal be given or granted to me and another; in theſe caſes, if I die, my executor or adminiſtrator ſhall not have any part of theſe goods or chattels; but the other ſurviving joint-tenant ſhall have them all. But otherwiſe it is of the goods and chattels that I and another have in common. And therefore if I and another have goods and chattels in that nature as before; and he, or I, grant that which doth belong unto us thereof unto a ſtranger; in this caſe, the ſtranger, and him of us two that hath kept his part, are tenants in common of the things; and therefore, if either of us die, the part of him that dieth in the goods and chattels ſhall go to his executor or adminiſtrator, and not to the other tenant in common.

Lit. ſect. 281. Perk. ſect. 125, 526. Lit. ſect. 320. 321.

If I have a judgment for land in a real or mixt action, and for damages recovered in the ſame ſuit, and I die; in this caſe, my executor or adminiſtrator, not my heir, ſhall ſue execution for and recover the damages, but not for the land. So if I recover damages againſt another for the detaining of my charters, and die; my executor or adminiſtrator ſhall recover the damages, but the heir ſhall have the charters; and the heir muſt ſue his *ſcire facias* for the charters, 'ere the executor can ſue for the damages. Alſo if I recover any debt or damage in any perſonal

Fitz. Executor 53. 84. 117.

ſonal action; my executor * or adminiſtrator ſhall recover and have this. See more *infra* at *numb.* 39. * P. 474.

Co. 6. 18. 9. 38. 5. 27. Plow. 280. 9 Ed. 4. 47. 36 H. 6. 7. Fitz. Adminiſtrator 2. 60

26. What an executor may do by virtue of his executorſhip: and the power of an executor, adminiſtrator, or ordinary.

The power and intereſt which the executor hath is wholly by the will. And hence it is, that an executor, whether he be abſolute or conditional, while he is executor, may do any thing as executor, (except only, ſue for debts and duties due to the teſtator) as well before the probate of the will, as he may do after, for before the probate he may enter into and ſeiſe the goods and chattels whatſoever they be, or give power to another ſo to do; and if any of them be taken or kept from him, he may have an action of treſpaſs, or a replevin to recover them; he may give or ſell any of the goods or chattels; he may pay any of the debts due from, and receive or releaſe any debts due to, the deceaſed (1). But it is otherwiſe in the caſe of an adminiſtration; for in as much as his power and intereſt is given to him wholly by the adminiſtration, therefore he can do nothing until the adminiſtration be granted. And yet in this caſe, as to the goods taken away before the adminiſtration, the adminiſtration ſhall have ſuch a relation as to give the adminiſtrator an action for them. But otherwiſe, after the adminiſtration is granted, the intereſt and power of the adminiſtrator is equal to and with the power and intereſt of the executor. And yet it is otherwiſe of the power and intereſt of the ordinary; for howſoever it ſeems by the ancient common law he might ſeiſe, preſerve, give, grant, and diſpoſe the goods of the inteſtate to pious uſes, yet might he not ſue for the goods or debts due to the inteſtate, no more than he might be ſued for any debt due from the inteſtate; and at this day he may only keep and preſerve the goods of the deceaſed until adminiſtration be granted, and ſue him, in the court of the ordinary, that doth detain the goods from him; and perhaps may ſue him that ſhall take the goods out of his poſſeſſion; for he may not ſell or give the goods of the deceaſed, nor receive or releaſe any debts; for in caſe where there is an executor made that is capable, *&c.* he is not to meddle at all with the eſtate until the executor refuſe; and where there is no executor, or that the party is dead inteſtate, the ordinary is preſently to commit the adminiſtration to the neareſt of the kindred; which when he hath done, his power is at an end; for it is doubted of ſome whether he may repeal an adminiſtration without cauſe or not: but it hath been clearly held by all, that he may not diſpoſe of the eſtate afterwards; and that he hath not power to enforce the adminiſtrator to give portions to children out of the eſtate; and that if he do go about it, either before or after the granting of the letters of adminiſtration, the adminiſtrator may have a prohibition. And accordingly divers have been granted: and yet notwithſtanding it ſeems this courſe is uſual; and prohibitions not often granted at this day. * An executor or adminiſtrator may, after the death of the deceaſed, enter into the houſe where the deceaſed lived, and where he died, and where the goods are, and take them away, and juſtify it; but he muſt do it within convenient and reaſonable time, as within thirty days after his death or thereabouts, and in a quiet and fair manner, when the door

Co. 8. 135. 9. 39. Dier 255. Weſtm. 2. cap. 20. 31 Ed. 3. c. 11.

Hil. 13 Ja. Co. Co. B. Henſlow's caſe. Trin. 3. Jac. Co. B. Davie's caſe. Hil. 2 Car. Co. 9. Potherlic's caſe. Lit. ſect. 69, Plow. 281. Bro. Executor, 129.

* P. 475.

(1) See more amply what acts an executor may do before proving of the will, and how far ſuch acts are valid, in caſe the executor afterwards dies before probate, in *Went. Off. Ex.* 34.—*God. Orp. Leg.* 144.—*Bac. Abr.* Executors, *&c.* (E. 4).—*Vin. Abr.* Executors (A. a.)—*Com. Dig.* Adminiſtration (B. 9.)

door is open, &c. [m] He may keep any of the goods of the deceaſed, ſo as he pay or lay out as much of his own money in and about the adminiſtration of the ſame eſtate. [n] He may, if he wants money to diſcharge funerals, or pay debts, ſell any of the chattels real or perſonal whereof the deceaſe died poſſeſſed; and that albeit the thing in particular be deviſed: as if a man be poſſeſſed of a term of years *inter alia*, and deviſe the ſame term to *I. S.*; the executor or adminiſtrator, notwithſtanding this deviſe, may at any time before aſſent given to the legacy, if he have not aſſets to pay the debts, ſell this term, and the legatee is remedyleſs. And ſo he may do alſo albeit there be enough beſides to pay the debts, and he have no need; but then in this caſe the legatee ſhall have ſome relief in a court of equity againſt the executor or adminiſtrator for damages, but the ſale is unavoidable. An executor or adminiſtrator may retain ſo much of the eſtate as to ſatisfy his own debt firſt, if any be due unto him. And if he have enough to pay all the debts and legacies, he may pay them in what order he will, without danger to himſelf, or wrong to creditors or legataries. And if he hath not enough, he may pay them in what order he will, but not without danger to himſelf. But if any thing be due to himſelf, he may pay that firſt of all; and for others that are in equal degree, he may pay which of them he will firſt. And for the legataries, he may prefer which of them he will, or pay one of them his whole legacy, and pay another a part of his, or not pay him any part of his legacy, if there be no aſſets to do it. But an executor or adminſtrator may not ſell any thing that is given in ſpecial to a legatee, to pay another legacy given to another legatee; nor compel a creditor or legatee to take ſome of the goods of the deceaſed for his debt or legacy whether he will or no; nor deviſe the goods he hath as executor or as adminiſtrator; neither can executors or adminiſtrators make diviſion of the goods amongſt them.

[m] Dier 2.

[n] Plow. 543, 544.

Plow. 184. 543. Co. 5. 28.

The addition to juſtice Dodridge's Treatiſe 93. Kelw. 62. 27 H. 8. 22. Plow. 525.

Infant.

An infant that is an executor, after the time he is capable, hath as much power as another executor of full age; for he may ſell the goods, receive debts, and make releaſes for the monies he doth receive, aſſent to a legacy when debts are paid, ſue, and be ſued, as another executor. And he is only diſabled to do any thing to hurt himſelf; and therefore if he releaſe a debt before he receive it, the releaſe is void; and if he aſſent to a legacy before the debts are paid, the aſſent is void; and if he do any other * act which would be a waſting of the goods in an executor that is of full age, it ſhall not bind him. And it ſeems that howſoever an infant executor after ſeventeen years of age may ſell any of the chattels perſonal he hath as executor, yet that after his age of ſeventeen years, and before he is twenty-one years of age, he cannot ſell a leaſe for years he hath in the right of his executorſhip, but that ſuch ſale is void.

Co. 5. 28.

* P. 476.

And ſo was it held by juſtice Hutton at Sarum aſſizes 21 Jac.

Woman covert.

A woman covert that hath a huſband, and is an executrix, may do any lawful act as another executor may do; but ſhe may not do any thing to prejudice her huſband; as releaſe a debt before it be paid, aſſent to or deliver a legacy before the debts be paid, or the like: and yet the huſband himſelf may do ſo.

Bro. Executor 178. 152. Fitz. Executor 55. Co. 5. 28.

27. The office, duty, and charge of executor, or adminiſtrator, and of the ordinary.

The office and duty in general of an executor or adminiſtrator is, to diſpoſe all the eſtate of the deceaſed wherewith he hath to do. 1. Truly, not to convert any of it to his own uſe, but

Co. 8. 133.

to the uſe and beſt advantage of the deceaſed, nor to labour by any undue practiſe or means to hinder any creditor of his debt. 2. Lawfully, to pay debts and legacies in that order the law preſcribeth. 3. Diligently, *quia negligentia ſemper habet comitem infortunium*; but more particularly, the firſt duty and care of an executor or adminiſtrator, after he hath taken upon him the charge of the adminiſtration of the goods and chattels of the deceaſed, after the goods are laid up, is to ſee the body of the deceaſed, laudably interred according to his rank and quality; wherein let the executor or adminiſtrator take this caution by the way, not to exceed in funeral pomp, eſpecially if it be ſo that the eſtate will ſcarcely reach to pay the debts; for let his expences be what they will, the judges (who in this are to determine what ſhall be allowed) will allow what they pleaſe, and they are pleaſed in ſuch caſes to allow but a ſmall matter; and whatſoever the executor or adminiſtrator doth lay out more, he muſt bear out of his own eſtate, if he have not enough beſides to pay the debts. The ſecond duty and care muſt be to make an inventory, *i. e.* a ſchedule containing a true and perfect deſcription of all the goods and chattels of the deceaſed at the time of his death; as of his wares, merchandizes, emblements, and the like, with their appraiſement and value, and of none elſe, and of all debts due to him and from him. And this muſt be made by and before two of the creditors or legataries of the deceaſed (if there be any ſuch and they will do it) and two others, or, in caſe they refuſe, by and before two other men of the honeſt neighbours. And herein let the executor or adminiſtrator take this caution by the way, not to intermeddle with the goods before he hath done this; for howſoever he may do any act as executor before the inventory be made, yet the ordinary may puniſh this upon him, except it be done with the ordinary's licence, who, in this caſe, may give what time * he will for the doing of it; and until the inventory be made and put in, it ſhall be preſumed againſt the executor or adminiſtrator that he hath aſſets in his hands to pay all men; and beſides, until this be done, he cannot deduct to ſatisfy his own debt firſt, and bar other men by plea. But of the other ſide, when he hath made and exhibited a true and perfect inventory of all the goods and chattels, it ſhall be preſumed againſt him, that he hath ſo much as is contained in the inventory and no more, unleſs more can be proved by witneſſes (1). 3. The third thing whereof the executor or adminiſtrator is to take care, is to prove the will if there be be any: and this the ordinary will compel him to do, but otherwiſe he may do any thing as executor, ſave only, ſue actions, as well before probate as after. 4. The fourth thing whereof the executor or adminiſtrator muſt take care, is to ſell and make money of the goods and chattels, and to receive the debts due to the deceaſed, and then to pay the debts and legacies due to the creditors and legataries; wherein the executor or adminiſtrator muſt be very cautious and wary. And for this purpoſe let him obſerve, that all the debts muſt be paid before any legacies be paid or delivered; and if there be not enough beſides to pay the debts, any thing

Doct. & St. 75. Plow. 543. Kelw. 64. — First, in the funerals.

Doct. & St. 35. Stat. 21 H. 8. c. 5. Dier 166. Swinb. part. 6. ſect. 6. 7, 8, 9, 10. — Secondly, in making an inventory.

* P. 477.

See Probate infra at numb. 41. — Thirdly, in probate of the will.

Co. 9. 88. Plow. 184. 545. Dier 80. Doct. & St. 75, 76, 77, 78. 132. Stat. 33 H. 8. cap. 39. Co. 5. 28. 4. 54. 59, 60. 8. 132. Dier 232. 1. 32. — Fourthly, in payment of debts and legacies; and the order of payment of debts and legacies.

(1) And this inventory muſt be delivered to the ordinary upon oath of the executor or adminiſtrator, if he is thereunto lawfully required—2 *Bl. Com.* 510.—See further as to the neceſſity and manner of making an inventory, in *Went. Off.* 50.—4 *Burn's Ecc. Law* 235.—*Com. Dig.* Adminiſtration (B. 7.)—*Swinb.* 420.

given

given by way of legacy may be ſold to make money to pay the debts, and the legataries muſt loſe their legacies; for *legatarii contendunt de lucro captando, creditores autem de damno vitando.* And in payment of debts this decorum muſt be obſerved: 1. Amongſt perſons that are creditors, the executor or adminiſtrator himſelf ſhall be preferred; ſo that if any debt be due to him, he may deduct to ſatisfy himſelf firſt, albeit others loſe their whole debt thereby, and eſpecially then when his debt is in equal degree with others debts (1). 2. After the executor or adminiſtrator is ſerved and ſatisfied his debt, then the King is to be preferred; ſo that if there be any debt due to him, and he begin his ſuit for it before any other man can get a judgment for his debt againſt the executor or adminiſtrator, his debt ſhall be paid before any others. 3. After the King is ſerved and ſatisfied his debt, then the debts of common perſons muſt be paid. And theſe alſo muſt be paid in this order or manner: 1. The debts due by record, by any judgment had againſt the deceaſed in any judicial proceeding in any court of record. 2. The debts due by ſtatutes or recognizances entred into by the deceaſed; for the debts due upon judgments muſt be ſatisfied before theſe; *ſit judicium prius vel poſterius.* 3. The debts due by obligations and penal and ſingle bills; for theſe are in equal degree, and theſe are to be paid after ſtatutes and recognizances. And yet if the ſtatute or recognizance be only for performance of covenants, and no covenant is broken, an obligation for the payment of preſent money ſhall be diſcharged before it. 4. The debts due for * rent upon leaſes of land, or grants of rents; but ſome ſay that debts due for rent in the teſtator's life-time (be the rent reſerved upon leaſes made by or without deed, for years, or at will) are in equality of degree with debts due upon ſpecialties. 5. The debts due for ſervants wages and workmen. 6. The debts due upon ſhop-books and verbal contracts; and yet it is ſaid by ſome, that legacies are to be paid before debts due by ſhop-books, bills unſealed, or contracts by word, *quod non credo.* And amongſt debts alſo that are in equality of degree, thoſe that are due are to be paid before thoſe that are not due; and thoſe whoſe day of payment is already come before thoſe whoſe day of payment is not yet come: and yet if the creditor, whoſe day of payment is already come, do not ſue for his debt, until his debt, whoſe day of payment is at a day to come, become due, the executor or adminiſtrator may ſatisfy which of them he will firſt (2) And amongſt debts that are due and already to be paid, thoſe that are firſt ſued for, are to be firſt paid; or if the creditors begin their ſuits together, the executor or adminiſtrator may pay which he will of them firſt; and to pay debts in any other order is dangerous: and therefore for this purpoſe, if the deceaſed owe two ſeveral debts of ten pounds a-piece to two ſeveral creditors by

21 Ed. 4. 21. Bro. Executor 38. 172. Co. 8. 133. Dier 32. Plow. 279. 280. Bro. Executors 103. Kelw. 74.

only in equal degree.

* P. 478.

Addition to juſt. Doddridge 92.

(1) See accordingly, 1 *Roll Abr.* 922.—*Plow.* 543.—An executor or adminiſtrator hath a right at law, in caſe of debts in equal degree to prefer one to another, to retain for his own in the firſt place againſt any other creditor, for he cannot ſue himſelf; and this privilege of retainer is founded on the policy of the common law, that executors may not be deprived of one advantage without having another in lieu of it, and that they may not be in a worſe condition than all mankind beſides; but an adminiſtrator may not retain againſt his co-adminiſtrator in equal degree; but ſhall be decreed to account. — See *Chapman* v. *Turner*, in chancery 26th *February* 1738. *Vin. Abr.* Executors (D. 2.) *pl.* 2.

(2) Though he has nothing left for the other; for until a ſuit is commenced the executor has not legal notice of the debt, *Dier* 32.—2 *Leon* 60.

ſeveral

ſeveral obligations, and the executor or adminiſtrator hath enough only to pay one of them, he that can firſt get judgment and execution ſhall firſt be ſatisfied; and if the executor or adminiſtrator do afterwards pay the other his debt, he muſt ſatisfy the firſt out of his own eſtate. If one that hath a debt due to him from the deceaſed upon a ſimple contract, or the like, ſue the executor or adminiſtrator for it, and there be debts due to others upon bonds and bills unſatisfied; in this caſe, the executor or adminiſtrator may not pay this debt, nor may he ſuffer the plaintiff to recover in his action; for if he do, and he have not aſſets beſides to ſatisfy the debts due upon bills and bonds, he muſt ſatisfy ſo much out of his own eſtate, as he hath ſo paid, or ſuffered to be recovered from him; for, in the caſe of an action brought, he is to plead and to ſet forth theſe debts upon eſpecialties, and to ſay that he hath no more but what is ſufficient to ſatisfy them, *&c.* and thereby he ſhall bar the plaintiff in his action. In like manner it is, if one that hath a debt due to him from the deceaſed upon an obligation ſue the executor or adminiſtrator thereupon, and there be debts due to others upon judgments, ſtatutes, or recognizances, and the executor or adminiſtrator ſuffer the plaintiff to recover the debt due upon the obligation for want of pleading the judgments, *&c.* or doth voluntarily pay that debt, and he hath not aſſets beſides to pay the debts due upon judgments, *&c.* in this caſe, he muſt pay ſo much out of his own eſtate towards the ſatisfaction of * the ſaid debts due upon judgments, *&c.* as he hath paid of the debt due upon the obligation. But here it muſt be noted that no judgment or ſtatute that is diſcharged, or is left and ſuffered to lie by agreement to bar others of their debts, ſhall be any bar to others that ſue for their due debts upon obligations, *&c.* and therefore if any executor or adminiſtrator ſhall plead any ſuch judgment, *&c.* in bar of any other debt ſued for by any other creditor, the creditor may by ſpecial pleading ſet forth this matter of covin, and avoid the plea and bar of the executor or adminiſtrator. If one creditor, whoſe debt is in equal degree and preſently due and to be paid, begin a ſuit againſt the executor or adminiſtrator for his debt, and he hath notice that the ſuit is begun againſt him, or the action is laid in the county where the executor or adminiſtrator doth dwell, or (as ſome have ſaid) in *London*, (in both which caſes, it ſeems he is bound to take notice thereof at his peril) and after this ſuit begun, he doth make voluntary payment of another debt in equal degree in all reſpects, for which no ſuit is begun; this is a *devaſtavit* in the executor or adminiſtrator, and if he have not aſſets to ſatisfy him who began his ſuit firſt, he ſhall be compelled to ſatisfy ſo much thereof as he doth voluntarily pay to the other, and that out of his own eſtate: and yet an executor or adminiſtrator may make voluntary payment of any debt due by record, as by judgment, ſtatute, *&c.* after ſuch a ſuit begun, and juſtify it. If two creditors in equal degree to all purpoſes begin to ſue for their debts at one time; in this caſe, the executor or adminiſtrator cannot ſafely make voluntary payment to either of them, unleſs he have enough to pay them both; but his ſafeſt way is to pay him firſt, that in a due and legal proceeding (for he may not covinouſly help one of them to a judgment ſooner) can firſt recover it by judgment and execution: and yet if, in this caſe, no ſuit be begun,

* P. 479.

Covin.

the executor or administrator may make voluntary payment to either of them in equal degree of his whole debt, albeit he have no assets left to pay unto the other any part of his debt. If *A.* and *B.* be two creditors in equal degree, and *A.* begin his suit first, and after *B.* doth begin his suit, and it happeneth that *B.* *bona fide* without any covin or agreement between him and the executor or administrator, doth get judgment and execution first; in this case, the executor or administrator may make payment to *B.* first of all. But if the executor or administrator doth by any covin and agreement help *B.* to his judgment and execution first, and by this means he is first satisfied, if there be not enough left to satisfy *A.* he must satisfy him out of his own estate. If two suits begin at or about one time, upon two several obligations, and the executor is forced to plead to them both * before either of them hath a judgment, so that he cannot plead the judgment that the other hath against him, and he hath not assets to satisfy both the debts sued for, and after the plaintiffs in both the suits get judgment and execution; *Quære*, what the executor or administrator may do in this case: and here note by the way, that it is policy for a creditor that hath cause to sue an executor or administrator, to be doing betimes, and to get judgment and execution as soon as he may; for it falleth out in this case, that he that doth first come shall be first served (1). After all the debts are paid in such order and manner as before, then is the executor or administrator to pay and to deliver the legacies: and herein the executor may prefer himself so, that if any legacy be given to him, he may detain and deduct it, albeit there be nothing left to discharge the legacies given to others (2): and after he hath satisfied himself, he may satisfy and deliver what legacies he will, albeit there be not enough to satisfy all the legatees; or he may pay to each of the legatees a part of their legacy, and deduct a part out of every legacy, where there is not enough to satisfy all the legacies: but if any particular thing, as a lease, or a horse, or the like, be given; this must be delivered accordingly, and may not be sold by the executor or administrator to pay others all, or any part, of their legacies: and if there be enough to pay all the legacies, they must be paid all according to the will: and it is said by some, that if an executor or administrator make no inventory of the goods, that he must pay all the legacies whether he have assets or not. The last thing an executor or administrator is to take care of, is, to make an account, (for it is held that an executor or administrator is not bound in law or conscience to make restitution for personal wrongs) wherein this is to be known, that the ordinary may, if he will, call the executor or administrator to account concerning the goods and chattels of the deceased, either generally or particularly as the case requireth; and that with or without the creditors or legataries instigation, within a year or what time he will; unto which account he may call all the creditors, and legataries; and therein the executor or administrator must shew

Covin.

* P. 480.

Doct. & St. 34. Plow. 545. Swinb. 110. 114.

Swinb. part. 6. sect. 17.

Fifthly, in making an account.

(1) See more amply as to the order of payment of debts in respect of their priority, in *Swinb.* 455.—2 *Bl. Com.* 511.—*Com. Dig.* Administration (C. a.) Chancery (3 G. 6.)—*Vin. Abr.* Executors (Q. a.) to (X. a.)—*Bac. Abr.* Executors, &c. (L. 6.)—*Went. Off. Ex.* 130.

(2) But it is said an executor may not prefer himself, in retaining his legacy, as he may a debt due to him from the testator.—See *Pretwill* v. *Stacy*, 2 *Vern.* 434.—*Attorney General* v. *Robins*, 2 *Pr. Wms.* 23.—*Swinb.* 29.

what he hath received, and what he hath laid out, and prove it in ſuch ſort as the ordinary ſhall like: and then if it be found he hath faithfully and fully adminiſtered, the ordinary may acquit him of the burthen, and then he is diſcharged of all ſuits in the ſpiritual court; but this account and diſcharge will not help nor avail him at all to diſcharge him of ſuits at the common law (1).

Co. 5. 83. 9. 39. Lit. ſect. 233. F. N. B. 120. Dier 232. Doct. & St. 132. Bro. Executor 90. Teſtament. 27. Stat. 31. Ed. 3. c. 11. 13 Ed. 1. c. 19. 21. H. 8. 25.

The office and duty of the ordinary, after the death of any perſon within his dioceſs, is, if he hear of any will made, and any executor appointed, to cite the executor, and to compel him to come in and prove the will, and to accept and take upon him * the adminiſtration of the goods, or to refuſe it; and if the executor refuſe, or if there be a will made and no executor appointed, the ordinary muſt commit the adminiſtration *cum teſtamento annexo* to whom he ſhall think fit, and take bond of the adminiſtrator to perform the will. And if there be no will made, he is to grant the adminiſtration of the goods to the next of kin, if he or they require it; and if not, to whomſoever beſides ſhall deſire it; or, if nobody ſeek it, he may grant letters to whom he will *ad colligendum bona defuncti*, and thereby take the goods of the deceaſed into his own hands: and then it ſeems he is to pay therewith the debts and legacies of the deceaſed, ſo far as the ſame will reach, in ſuch order as the executor or adminiſtrator is to pay them. See more of this queſtion in numb. 29. *infra* (2).

* P. 481.

28. Where and how an executor or adminiſtrator ſhall charge others in reſpect of the eſtate of the deceaſed; and what actions and remedy he may have againſt others and what not, and how.

An executor or adminiſtrator regularly ſhall charge others for any debt or duty due to the deceaſed, as the deceaſed himſelf might have done; and the ſame actions the deceaſed might have had, the ſame actions for the moſt part the executor or adminiſtrator may have alſo: and therefore he may have an [a] action of account, [b] an action of treſpaſs *de bonis aſportatis in vita teſtatoris*, [c] an action of debt againſt a gaoler upon the eſcape of a priſoner, [d] a writ of error upon the ſtatute of 27 *Eliz.* [e] an attaint upon the ſtatute of 23 *H.* 8. a writ of reſtitution upon the ſtatute of 21 *H.* 8. [f] an action upon the caſe, upon the *aſſumpſit* of the teſtator, [g] an *indempnitate nominis* when the deceaſed's goods are taken upon an outlawry againſt another man of his name, [h] an action of covenant for breach of a covenant made to the deceaſed (3), [i] an action upon the caſe, upon the trover and converſion of the goods of the teſtator, [k] an *ejectione firmæ* for an ejectment of the teſtator out of a term, [l] an action of debt for the rent behind in the life-time of the deceaſed, [m] an action of debt for the arrearages of an annuity due to the teſtator in his life-time, [n] and a raviſhment or ejectment of ward for a wrong done to the deceaſed. [o] But an executor or adminiſtrator ſhall not charge another, or have any action againſt him, for a perſonal wrong done to the teſtator, when the wrong done to his perſon, or that which is his, is of that nature, as for which damages only are to be recovered: and therefore an executor or adminiſtrator cannot ſue another for the beating or wounding of the deceaſed, or for a treſpaſs done to him in his

a Weſt. 2. c. 22.
b F. N. B. 117.
c Dier 322.
d Co. 11. 41.
e Co. 6. 80.
f Co. 9. 86.
g Stat. 9 H. 6. c. 4.
h Bro. Executor 161.
i Co. 5. 27.
k 7 H. 4. 6.
l Co. 4. 50.
m Bro. Executor 169.
n Bro. Executor 122. Co. 9. 89.

(1) See further, at what time and in what manner an executor muſt account, in *Swinb.* 464.

(2) And further as to the office of the ordinary, in *Vin. Abr.* Executors (A.)—*Bac. Abr.* Executors, &c. (E.)—*Stat.* 4 *Ann. c.* 16. § 16.

(3) For a covenant broken in the life-time of the teſtator, the executor, and not the heir or aſſignee, ſhall have the action of covenant, although it were a covenant real, which runs with the land, and the damages ſhall be recovered by the executor, though not named, as he perſonally repreſents the teſtator, 2 *Lev.* 26.—*Vent.* 175.

cattle,

cattle, graſs, or corn, or for waſte done by his tenant in his lands; for theſe are ſaid to be perſonal actions which die with the perſon, according to the rule, *actio perſonalis moritur cum perſona.*

If the teſtament be kept from the executor, he may have remedy to recover it in the ſpiritual court: ſo if the goods of the deceaſed be kept from him, he may ſue there for them if he will, or * he may ſue in any court of common law. And if there be a will, and an executor made, or two adminiſtrations granted together, he that is rightful executor or adminiſtrator may ſue the wrongful adminiſtrator for the goods in his cuſtody. 36 H. 6. 7. Co. 8. 135.

* P. 482.

If one grant a rent out of his land for life, provided that it ſhall not charge his perſon, and the rent is behind, and the grantee dieth; in this caſe, the executor or adminiſtrator of the grantee may have an action of debt for theſe arrearages. Co. ſuper Lit. 146.

If any rent, or arrearages of rent, be due to me upon a grant of rent out of any land to me, or reſervation of rent upon any eſtate made by me of land; in theſe caſes, my executor or adminiſtrator may have an action of debt for this rent, or he may diſtrain for it, ſo long as the land chargeable with the rent, and out of which it doth iſſue, is in his poſſeſſion that ought to pay it, or in the poſſeſſion of any one that doth claim by or under him. Co. 4. 50. Stat. 32 H. 8. cap. 37.

If any of my houſhold ſervants do convey away and eloin, or deſtroy any of my goods; my executor or adminiſtrator may have a ſpecial commiſſion out of the chancery to enquire of and to puniſh it. And in caſe where a man doth ſue as executor or adminiſtrator, he muſt in his action name himſelf as he is; *i. e.* if he be an executor, he muſt name himſelf ſo; and if an adminiſtrator, he muſt name himſelf ſo: and if there be many executors, and ſome accept and ſome refuſe, if they bring any action, they muſt be all named in the writ: and yet if one executor have goods in his poſſeſſion and he alone ſell them, perhaps for this contract he may bring an action for the money in his own name; ſo alſo if the goods be taken out of his poſſeſſion alone, it is ſaid he alone may ſue for them; but the ſafeſt way in theſe caſes is to ſue in the names of all the executors; for the poſſeſſion of one of them is ſaid to be the poſſeſſion of all of them (1). See Stat. 38 H. 6. c. 1. Co. 5. 33. Bro. Treſpaſs 346. Fitz. Executor 14.

29. Where and how an executor or adminiſtrator ſhall be charged by others, and what actions and remedy may be had againſt him, or not.

An executor or adminiſtrator regularly ſhall be charged by others, for any debt or duty due from the deceaſed, as the deceaſed himſelf might have been charged in his life time, ſo far forth as he hath any of the eſtate of the deceaſed to diſcharge the ſame. And therefore if a man bind himſelf by obligation or covenant to pay money, or do any ſuch like thing; and do not bind his executors or adminiſtrators by name; in this caſe, the executor or adminiſtraton may be ſued and may be charged as far forth, &c. as if they where named. And yet where the covenant is but perſonal, as where one doth make a leaſe for years, and the leſſor doth covenant to pay the quit rents, but he Co. ſuper Lit. 209. 5. 17. Dier 14. 23. Doct. & St. 112. Bro Deſcent 53.

(1) Where there are divers executors, the action commenced by them, or againſt them, ought to be commenced in all their names, and not in the name of ſome of them only; becauſe they all repreſent the perſon of the teſtator, therefore they muſt join in all ſuits brought to recover his eſtate, and as well thoſe who refuſed, as thoſe who proved the will, muſt be named; but where they are defendants, thoſe only are to be named who proved the will, *Swinb.* 6th edit. p. 324.—See more amply, what actions may be brought by executors or adminiſtrators, and in what manner, in *Com. Dig.* Adminiſtration (B. 13.)—*Bac. Abr.* Executors, &c. (N.) and (O.)——*Went. Off. Ex.* 95.—*God. Orp. Leg.* 154.—*Vin. Abr.* Executors (Q).

doth

doth not ſay during the term; by this it ſeems the executor or adminiſtrator of the leſſor ſhall not be charged. ° An action of the caſe lieth againſt him upon *aſſumpſit* of the ſimple contract of the teſtator, eſpecially * where the ground of the *aſſumpſit* is a true debt, a *rationabili parte bonorum* lieth againſt him; a *detinue* lieth againſt him for the goods delivered to the deceaſed, if the executor or adminiſtrator do ſtill continue the poſſeſſion of them; and alſo an action of debt lieth againſt him for arrearages of account found upon the deceaſed before auditors.

° Co. 9. 86. Plow. 182.

F. N. B. 121. 3 H. 6. 35. 11 H. 4. 45.

* P. 483.

Stat. 25 Ed. 1. c. 11. The executor or adminiſtrator of the father, that hath levied aid of his tenant for the marriage of his daughter, ſhall be charged with it, and the daughter may ſue for it.

F. N. B. 56. The executor or adminiſtrator of a guardian in chivalry, that doth commit waſte in the ward's lands, ſhall be charged, and may be ſued by the heir for it.

Co. 5. 12. Co. 8. 94. If a man, poſſeſſed of a term of years, deviſe it to another, and the executor or adminiſtrator of the deviſor, before the aſſent to the legacy, doth commit waſte in the land in leaſe; in this caſe, he ſhall be charged with, and may be ſued for, this waſte by him in reverſion: but if the executor die, his executor ſhall not be charged with it: for it is a perſonal wrong that dieth with the perſon.

Dier 370. If a biſhop grant an annuity out of his lands to *I. S.* for life, and die; in this caſe, it ſeems the executor or adminiſtrator of the biſhop ſhall be charged with the arrearages due in the biſhop's time.

Bro. Executor 127. Co. 3 24. 22. If a leaſe for years be made rendering rent, and the rent is behind and the leſſee die; in this caſe, the executor or adminiſtrator of the leſſee ſhall be charged for this rent. So alſo if leſſee for years aſſign over his intereſt and die, his executor or adminiſtrator ſhall be charged with the arrearages before the aſſignment, but not with any of the arrearages due after the aſſignment.

Bro. Executor 157. The executor or adminiſtrator of a cuſtomer or comptroller ſhall be charged upon a taille (or tally) of the exchequer ſhewed to the teſtator.

Weſtm. 2. c. 35. The executor or adminiſtrator ſhall be charged for a raviſhment or ejectment of ward by the deceaſed.

Trin. 7 Jac. B. R. F. N. B. 51. The executor or adminiſtrator may be charged in the ſpiritual court for tithes due from the deceaſed: but he may not (as it ſeems) be ſued in any temporal court for them.

Curia 21 Jac. B. R. The executor or adminiſtrator of a man that recovereth a debt upon a judgment had by the deceaſed, ſhall be chargeable with reſtitution, if the judgment be reverſed for error.

Co. 9. 87. F. N. B. 117. Dier 322. 11 H. 4. 46. Doct. & St. 76. Co. 8. 94. 133. An executor or adminiſtrator ſhall not be charged for any perſonal wrong done by the deceaſed; and therefore no action may be brought againſt him for any ſuch cauſe; as becauſe the deceaſed did burn the deed of the plaintiff, ſuffer a priſoner at his fait to eſcape, cut down his trees, eat up his graſs, beat or wound the * body of the plaintiff, defame him in his name, or the like; for all theſe are ſaid to be perſonal actions that die with the perſon; neither is there any remedy to be had againſt the executor or adminiſtrator in equity in theſe caſes, neither ſhall he be charged in any action of accompt for any receipt or occupation by the deceaſed. And yet perhaps an action of the caſe may lie in this caſe: neither will an action of debt lie againſt him upon ſimple contract of the deceaſed, but an action of the

* P. 484.

the caſe only. Neither will an action lie againſt an executor or adminiſtrator upon an arbitrament made in the life-time of the deceaſed, albeit it be made in writing. Neither will any action lie againſt any executor or adminiſtrator for coſts given in the ſtar-chamber or chancery againſt the deceaſed in a ſuit there; but when the party dieth, the ſame is loſt: and where a man doth ſue an executor or adminiſtrator in a ſuit, he muſt charge him as he is, *viz.* if he be an executor, he muſt ſue him by that name; if an adminiſtrator, then by that name. And where there be many executors, and have all accepted, they muſt be all ſued; but if ſome of them have refuſed perhaps the ſuit may be good enough againſt the reſt (1). But otherwiſe one executor cannot be charged without his companions, except it be in the caſe of ſummons and ſeverance, and in ſome ſpecial caſe where one alone doth the wrong and the like, as where one executor alone doth detain the deeds from the heir; for in this caſe, he alone may be charged. See more *infra*, at *numb.* 39 (2).

Adjudged. Hil. 40 Eliz. B. R. Bowyer's caſe. Hil. 7 Jac. B. R. per 3 Juſtices. Co. 9. 39. 40. Hut. Exec. 78. Bro. Executor 136, 136. Fitz. Brief 341.

30. What act one executor or adminiſtrator alone may do; and where the act or laches of one may prejudice or bar his companion, and where not.

All the executors, where there be more than one, be they never ſo many, in the eye of the law are but as one man; in which reſpect the law doth eſteem moſt acts done by or to any one of them, as acts done by or to all of them. And therefore the poſſeſſion of one of them of the goods and chattels of the deceaſed, is eſteemed the poſſeſſion of them all; payment of debts by or to one of them is eſteemed payment by or to them all; the ſale or gift of one of them of the goods and chattels of the deceaſed, the ſale and gift of them all; a releaſe made by or to one of them, is a releaſe made by or to them all; and the aſſent of one of them to a legacy the aſſent of them all. And therefore if there be two executors, and one of them deliver up the obligation to the debtor whereby he is bound, the other executor ſhall not recover it in a detinue. So if two executors have lands or goods in execution, and one of them releaſe all his intereſt, this is a total diſcharge of the execution. And yet if in this caſe there be any practiſe between the executor and the creditor in this matter, and there be not aſſets beſides to pay all the debts and legacies, here perhaps the other executor may have remedy in equity againſt his co-executor and the creditor. But how the law is of adminiſtrators, *quære*; for ſome think that one * of them alſo may ſell goods, releaſe debts, plead to actions or the like, without the other.

21 Ed. 4. 25. 4 H. 7. 4. 16 H. 7. 4. Bro. Executor 66. 30. 65. 9 Ed. 4. 12. Fitz. Executor 10.

Adjudged Mic. 39. 40. Eliz. B. R.

Crompt. Jac. 45. 4 H. 7. 4.

* P. 485.

If one executor attorn to the grant of a reverſion, or a rent, this is as good as if they did all attorn, and will bind all the reſt; as in caſe of an aſſent to a legacy; for in this caſe, the aſſent of one will bind all the reſt, albeit there be not enough to pay the debts beſides the legacy given away by aſſent; but his aſſent ſhall not hurt his co-executors in a *deveſtavit*.

Dier 210. Co. 4. 31. Addition to juſtice Doddridge 4.

If one executor appear to an action ſued againſt them all, or plead a plea to it; this for the moſt part ſhall be ſaid to be the appearance and plea of them all, and ſhall bind the reſt.

Co. 9. 38. Dier 210.

If two executors ſue together, and one of them is ſummoned and ſevered; in this caſe, he that is ſummoned may before judg-

Dier 319. 210. 16 H. 7. 4.

(1) See the note to fo. 460, before, and alſo *Went. Off. Ex.* 95.

(2) And further as to what actions may be brought againſt executors and adminiſtrators, and in what manner, in *Bac. Abr.* Executors, &c. (P.)—*Com. Dig.* Adminiſtration (B. 14.)—*Went. Off. Ex.* 116.—*Swinb.* 397.—*Vin. Abr.* Executors (H. a.)—*God. Orp. Leg.* 162.

ment

ment releaſe the duty; but if the other proſecute to judgment firſt, and then he that is ſevered acknowledge ſatisfaction, this will not benefit the defendant, nor bar the reſt that are plaintiffs in the judgment. And if three executors ſue, and two are ſummoned and severed, and the third recover and die; in this caſe, the other two ſhall have execution. See more at *numb.* 27. *ſupra.*

27 H. 8. 11. 6 H. 7. 8. Plow. 343. Fitz. Executor 6.

31. What act one executor may do to another, and what remedy or action one executor or adminiſtrator may have againſt another, or not.

One executor or adminiſtrator cannot give or ſell any of the goods or chattels of the deceaſed to another executor or adminiſtrator; and therefore they may not make diviſion of the goods amongſt themſelves; and regularly one of them cannot ſue another of them. And therefore if one keep, give, or ſell all the goods, releaſe debts, or the like, in the diſturbance of the execution of the will or due adminiſtration of the eſtate; it ſeems the other hath no remedy againſt him, except it be in the caſe of covin before: but if all the reſidue of the goods and chattels after debts and legacies paid be given to one of the executors alone; and after the debts and legacies paid, the reſt do detain it or any part of it from him; in this caſe, perhaps he may have ſome remedy againſt them.

11 H. 433.

If the debtor make his creditor and another his executors, and the creditor doth refuſe the executorſhip, and the other doth accept it; in this caſe, the creditor may ſue the executor for this debt: but if both prove the will, and one of them die, the ſurviving co-executor cannot ſue the executor of the dead executor for this debt. And if one make a woman and two others his executors, and a creditor before ſhe doth accept of the executorſhip doth marry her; in this caſe, he may ſue the other executors for this debt; but if ſhe have accepted of the executorſhip firſt, *contra.*

Plow. 543. Co. 532. Doct. & St. 75. Perk. ſect. 488, 570. K. 59.

32. *Devaſtavit quid.* What ſhall be ſaid a *devaſtavit* and waſting of the goods of the deceaſed by an executor, or adminiſtrator, and how he ſhall be charged thereupon. * P. 486.

A *devaſtavit* or waſte in an executor or adminiſtrator is when he doth miſ-employ the eſtate of the deceaſed, and miſdemean himſelf in the managing thereof againſt the truſt repoſed in him. * And this may be done divers ways, as 1. When the executor or adminiſtrator doth beſtow more upon the funeral of the deceaſed than is meet, having reſpect to his degree and eſtate. 2. When he doth pay legacies in money, or aſſent to legacies given in other things before the debts are paid, and hath not enough beſides to pay the debts. 3. When he doth not pay the debts in that order and manner as is before ſet down; but doth pay them firſt that he ſhould pay laſt, and he hath not enough to pay them all. 4. When he doth releaſe a debt or duty due to the deceaſed before he doth receive it; or when, the goods of the deceaſed being taken from him, he doth releaſe to him that doth take them the action, whereby he may recover them. 5. When he doth ſell the goods of the deceaſed much under value, eſpecially if it be with covin, as to his near friends, to his own uſe, to have money under hand, or the like; but otherwiſe to ſell them under value, eſpecially where he cannot conveniently make more of them, is no waſte. All theſe, and ſuch like acts as theſe, are ſaid to be a waſte in an executor or adminiſtrator; and being diſcovered againſt him by the return of the ſheriff, (or as ſome think by inqueſt of office) it will produce this effect, to make the executor or adminiſtrator chargeable for ſo much as he hath miſ-employed and waſted *de bonis propriis*; ſo that any creditor may charge him for the debt due to him from the teſtator as for his own proper

Dier 185. Co. 5. 32. Old B. of Entries 11.

per debt; and for ſo much the execution ſhall be made againſt him upon his own body, lands and goods: and yet ſo as one executor or adminiſtrator ſhall not be charged for the waſte of another; for if there be many executors and one of them only doth commit the waſte, he only ſhall be puniſhed for this waſte. And the executor or adminiſtrator, if he do commit a waſte in the gift or ſale of goods, ſhall anſwer it alone: For he to whom the goods are given or ſold, ſhall not be puniſhed for it; neither ſhall the executor or adminiſtrator of the executor or adminiſtrator be puniſhed for it after his death. And howſoever the huſband ſhall be charged in a *devaſtavit* for the waſte of himſelf or his wife, where ſhe is an executrix whilſt they both live together; yet if a woman executrix take a huſband, and during the marriage he or ſhe doth commit a waſte, and after ſhe dye; in this caſe, it ſeems the huſband ſhall not be charged for the waſte himſelf or his wife did: *Sed quere* of this. For if a void adminiſtration be committed, and the adminiſtrator do waſte the goods, and after the adminiſtration is committed to another; in this caſe the firſt adminiſtrator may be charged by the creditors for the waſte done in his time (1). But an executor or adminiſtrator may lawfully ſell or convert the goods of the deceaſed to his own uſe, ſo as he convert the money to the uſe of the deceaſed, in payment of debts, or the like, and pay ſo much of his own money as the * goods ſo converted to his uſe are worth; and theſe acts are not eſteemed a waſte in him. Alſo he may ſell any ſpecial legacy that is given, and this is no waſte in him; howbeit it is a wrong to the legatee, if there be aſſets to pay debts beſides. And when he hath enough to pay all the debts and legacies, then he may diſpoſe of the whole eſtate how he will, without any prejudice to himſelf at all (2).

Dier 210. Doct. & St. 78.

2 H. 7. 15. Co. 5. 27. M. 3 Jac. B. R.

Co. 9. 18.

Dier 2. 187. Plaw. 543.

* P. 487.

35. Executor of his own wrong: who ſhall be ſaid to be ſo: and what act ſhall make him ſo to be accounted: and what act ſuch an executor may do, and how he ſhall be charged, or not.

An executor of his own wrong is one that is neither lawful executor nor adminiſtrator, and yet doth take upon him to do and act ſuch things as are only fit for and proper to an executor or adminiſtrator; as to take the goods of the deceaſed into his own poſſeſſion; give and ſell them; pay the debts of the deceaſed therewith; releaſe the debts due to the deceaſed; and the like. And a man may make himſelf ſuch an executor by any ſuch intermeddling with the office and work of an executor, as followeth; 1. By proving the will with the money of the dead; but to prove another man's will at my own charge, will no more make me chargeable as executor of mine own wrong, than to bury the deceaſed in a decent manner out of my own eſtate. 2. By a ſeizing, gaining, keeping and uſing the goods of the deceaſed as a man's own, eſpecially if he convert them to his own uſe, ſell, or otherwiſe diſpoſe them; and every colour of title will not help in this caſe; for if a man make a deed of gift of all his goods and chattels to another, and dyeth inteſtate, and this in truth is fraudulent and in truſt, and the donee after the death of the donor, doth diſpoſe of theſe goods and chattels as his own; in this caſe, and by this means, he ſhall be eſteemed as executor of his own wrong. And yet if the deed of gift be *bonâ fide* in ſatisfaction of a juſt debt, and the

Terms of the Law. Kelw. 59. 93. Dier 105. 157, 255. Co. 5. 32. Bro. Executor, 162.

(1) See accordingly, *God. Orp. Leg.* 206.

(2) See more amply what ſhall be deemed a *devaſtavit* in an executor or adminiſtrator, and in what manner remedy may be had againſt them, in *Bac. Abr.* Executors, &c. (L.)—*Vin. Abr.* Executors (X. a. 5.)—*God. Orp. Leg.* pt. 2. *c.* 26.—*Went. Off. Ex.* 157.—*Com. Dig.* Adminiſtration (I.)

goods be no more than the debt, it may be otherwiſe: but if the goods be much more than the debt, there it ſeems it ſhall be charged ſo for the overplus; and that, whether he have them in poſſeſſion or not; and ſo was the opinion of juſtice *Jones* at *Gloucester* aſſizes, 9 *Car.* If the ordinary grant letters *ad colligendum & vendendum* the goods of the deceaſed that are like to periſh, and *I. S.* to whom the letters are made, under colour thereof, doth take and ſell the goods; hereby he may make himſelf chargeable, as executor of his own wrong: for the ordinary hath no ſuch power himſelf, and therefore he may not give that power to another. If a man that is next of kin procure a beggar, or a ſtranger, to take out an adminiſtration, and then to make him a deed of gift of all the goods for a ſmall matter; he may be thus charged for the overplus of the worth of the goods more than he gave. So if a Debtor procure ſuch an adminiſtration to be taken out, and then get a releaſe of his debt from the adminiſtrator; this may make him chargeable as executor of his own wrong, for ſo much as his debt doth come unto. And yet a * man may take away his own goods, that were in the hands of the deceaſed, without danger. And every having and poſſeſſing of the goods of the deceaſed will not make a man executor of his own wrong: for if a man dye in my houſe and have goods there, and I keep them until I can be well diſcharged of them; this will not make me chargeable as executor of mine own wrong. So if I do only lay up the goods of the deceaſed to preſerve them in ſafety for him that ſhall have right to them, this will make me no more chargeable, than if I take an inventory of all the goods of the deceaſed. So if another man take the goods of the deceaſed and ſell them to me, or give them to me; howſoever this will make him chargeable as executor of his own wrong, yet this will not make me chargeable ſo. Neither will every diſpoſition of the goods of the deceaſed make a man executor of his own wrong; for if a man ſell ſome of the goods of the deceaſed (where there is need) to help forward a decent funeral of the body of the deceaſed; this is no ſuch diſpoſition as to make a man chargeable thus. So if I deliver the wife of the deceaſed her neceſſary wearing apparel; or if I be wife to the deceaſed, and take it myſelf. So where I take any of the deceaſed's goods into my hands by miſtake, ſuppoſing them to be mine own, or under colour of title; as when I have a good deed of gift or ſale of them without any fraud or covin; or under a good authority, as when I take them upon a warrant from the ſheriff that hath proceſs out of the exchequer to take them; or as a treſpaſſer only, as when I kill or otherwiſe abuſe the cattle; ſuch an intermedling with the goods of the deceaſed will not make a man chargeable as executor of his own wrong, neither may I be ſo charged in theſe caſes. The third way, by which a man may make himſelf chargeable as executor of his own wrong, is by delivering of the goods of the deceaſed to creditors in ſatisfaction of their debts, or by ſelling any of the goods of the deceaſed to pay the debts of the deceaſed, and paying the ſame with the money made thereof; but to pay the deceaſed's debt with a mans own money will not make him chargeable ſo. The fourth way, by which a man may make himſelf ſo chargeable, is by receiving any of the debts due to the deceaſed. The fifth way, by which a man may

* P. 488.

Stat. 43 Eliz. cap. 8.

Plich. 7 Jac. Co. B. per. ch. juſtice.

Trin. 17 Jac. per chief juſt.

Co. 5. 34. Kelw. 63.

Kelw. 63. 52. 33 H. 6. 31. 32 H. 6. 6. Dier 267. Co. 5. 34. 20 Ed. 4. 17. Fitz. Executor 122.

See the caſes before.

Dier 166.

may make himself chargeable so, is by releasing any debts or duties due to the deceased. The sixth way, by delivering any legacies given by the deceased in kind, or by paying any legacies, except it be with a mans own money. The seventh way, by taking a mans legacy given to him, before the executor have accepted of the executorship and assented to the legacy. The eighth way, by suing as executor to the deceased for any debt due to the deceased. And the ninth way, by taking upon him to sell the lands of the deceased as his executor. In all these cases, * and by all these and such like means, a man may make himself an executor of his own wrong: so that if an executor after he hath legally waved the executorship, or an administrator after his administration is repealed and revoked, intermeddle with the estate in any such manner, he may be charged as executor of his own wrong: and if a woman take more of her wearing apparel than is necessary and convenient for one of her rank, and condition, without legacy of the husband, and licence of the executor, she may be charged thus.

Dier 166.

* P. 489.

Dier 166.

35 H. 6. 32.

And if a man, under colour of an administration that is not good, or of a commission *ad colligendum bona defuncti* that is not good, or of a will, when in truth there is none at all, or no good will, do take upon him to intermeddle with the goods, and to dispose of the estate in manner as aforesaid, by this means he may make himself chargeable thus. And in these cases, and by these means, such persons that do so intermeddle, do make themselves to be accounted in law, executors; but executors by wrong only, and not executors by right. And therefore such persons have not the favor nor power of lawful executors, as to bring an action for debt due to the deceased, to deduct and pay themselves any debt due to themselves first of all, and to bar other creditors, and the like. And for so much as they have so disposed and mis-employed, and for no more, they make themselves chargeable to any creditor or legatee of the deceased that shall sue them, as far forth as a lawful executor is chargeable. And albeit he, that doth thus, be a creditor, yet this will not help him; for a creditor may not enter upon the goods of the deceased, and pay himself first; and if he do so, if there be a lawful executor or administrator made, he may sue the creditor; and if there be no executor or administator made, the creditor may by this means make himself chargeable to other creditors, as executor of his own wrong, for so much as he hath taken into his own hands: and then a man shall be charged the rather in these cases, and by this means, when there is no executor made; or, if there be an executor made, when he doth refuse to take upon him the executorship; nor any administration granted: for when a man dieth intestate, and a stranger taketh and useth the goods of the deceased as his own, albeit he pay no debt or legacy, nor do any other act as executor, yet, when no other man taketh upon him the administration, this intermeddling shall make him chargeable as executor of his own wrong: for in that case the creditor hath no other remedy: but in case where there is an executor made, and he doth prove the testament, and doth take upon him the administration of the goods, and then a stranger taketh out of the hands of this executor, or getteth into his own hands, all or some of the goods of the deceased, and useth them as his own; * this will not make this stranger executor of his own wrong;

Dier 255. 160. Co. 5. 34. 9. 39.

Co. 5. 34. Plow. 148. 145. 33 H. 6. 32.

Dier 210. Plow. 184. Co. 5. 33.

Co. 5. 33. Kelw. 59.

* P. 490.

for

for now there is a lawful executor, against whom the creditor may have his remedy; and the executor shall have his remedy for these goods against the stranger, for they are and shall be accounted assets in the hands of the executor still, notwithstanding the stranger hath the possession of them: And yet in this case also, where there is a rightful executor, if a stranger shall take the goods into his hands, claim to be executor, pay debts and legacies, and receive debts, and intermeddle as an executor, in this case, perhaps, and by this express administration as executor, he may be charged as executor of his own wrong, albeit there be a lawful executor; and if a man die intestate, and a stranger intermeddle with the estate as before, and then the administration is granted to another; in this case, the stranger may be charged by any creditor or legatee as executor of his own wrong, for his intermedling before the administration granted; for the rightful executor or administrator shall be charged with no more than what doth come into his hands. And if an administration be granted afterwards to any one that hath so intermeddled with the goods before, this will not purge the wrong done before; and therefore in this case, a creditor may charge him as executor of his own wrong, or as a lawful administrator, at his election (1).

Pasche. 39 Eliz. Co. B. Bradbury v. Reynolds.

Co. 5. 29. 6. 27. 9. 27.

The administrator *durante minori ætate* is a special kind of administrator, and is in case where an infant under the age of seventeen years (for at that age an infant is capable of an executorship) is made an executor, and the administration of the goods (as the manner is in that case) is committed to one or more of the next friend or friends of the infant during his minority, which is until he be of the age of seventeen years; he that hath such an administration granted unto him is such an administrator. And he is sometimes general, *i. e.* when his administration is granted unto him without any words of limitation; and sometimes he is special, *i. e.* when his administration is granted to him *ad opus & usum* of the infant only. In the first case, he hath as large a power as another administrator hath; and therefore he may assent to a legacy, albeit there be not assets to pay debts; he may sell any of the goods or chattels of the deceased, or give them away, or the like, as another administrator may do. But in the last case, it is otherwise; for such a special administrator can do little more than the ordinary himself; and therefore he may not sell any of the goods or chattels of the deceased, except it be in case where they are like to perish, for funeral expences, or for payment of debts; nor may he assent to a legacy where there is not assets to pay debts, &c. And this administration is *ipso facto* determined, when the executor doth come to the age of seventeen years: and therefore if it be granted during the minority of four executors, * and one of them dye, or come to the age of seventeen years; now is the administration determined: And if the executor be a woman, and she take a husband that is seventeen years of age or upwards; in this case, it seems the administration is determined: And therefore also it is, that if such an administration *durante minori*

34. Administrator *durante minori ætate*; what he is, and his power, and when it shall end.

* P. 491.

(1) See further as to what act will make an executor *de son tort*, and what remedy may be had against him, in the references in the note to *page* 447.—and see also 2 *Bl. Com.* 507.—*Com. Dig.* Administrator (C.)

ætate be granted after the executor is seventeen years of age, the administration is void (1).

35. Where an administration, once committed by the ordinary, may be afterwards revoked; and what shall be said a revocation of such an administration, or not; and what acts done before shall stand in force, or not.

It hath been held, that the ordinary, after he hath granted the administration of the goods of a man intestate to one, may afterwards without cause revoke the same and grant it to another, at his pleasure: and that if the ordinary grant letters of administration to one, and after grant letters of administration to another, of the goods of the same man, that hereby the first letters of administration are *ipso facto* countermanded, albeit there be no words of revocation in them: but it seems the law is otherwise, and that after the ordinary hath granted the administration according to the charge and direction given him by the statutes, he cannot afterwards revoke it, and grant it to another, without cause; *i. e.* unless the first administration be illegally granted; as when it is granted to a stranger, and not to the next of kin, or the like; or unless the first administrator cannot or will not administer; for, in these cases, he may without doubt grant the administration to another. And yet in these cases, where there is a former administration granted regularly, all acts that the first administrator doth lawfully execute and do as administrator, as sale of goods, payment or receipt of debts, making releases, and the like, are good, and shall bind the next and succeeding administrator. And therefore, if the ordinary, after the death of a man intestate, doth grant the administration of his goods to a stranger; and then the next of kin doth sue by citation to have it repealed; and the first administrator, hanging that suit in the spiritual court, doth sell the goods, of purpose to defeat the second administration; and after, the first letters of administration are revoked by sentence, and the first sentence annulled, and the administration is committed to another; in this case, the second administrator cannot recover these goods or have any remedy for them. And yet perhaps, if there be any fraud in the case, an executor may have relief upon the statute of 13 *Eliz.* But if the first suit and sentence be by appeal avoided, then all that the first administrator doth is void; and the second administrator may recover the goods notwithstanding the sale: and if the first administration be upon condition, all the acts the administrator doth, before the condition is broken, are good; and therefore, if he give or sell the goods, the subsequent administrator cannot avoid it.

4 H. 7. 14. Lit. sect. 330. 34 H. 6. 14. Dier 339. Bro. Administrator 7.

See the stat. 21 H. 8. c. 5. Co. 6. 18. New book of entries 38.

Plow. 281. Co. 6. 18. 19. Dier 339.

Co. 6. 19.

If a man dye intestate, and have not *bona notabilia*, and the * Bishop of the Diocess grant letters of administration to one; and after, the archbishop doth grant letters of administration to another; in this case, the effect of the first administration is suspended, until the other be repealed and declared by sentence to be void. If there be a will, and it is concealed, and thereupon an administration is granted; and after, the will is produced and proved; in this case, the administration is *ipso facto* determined, and all the acts the administrator hath done *ab initio* are become void. See more in the next question.

Co. 8. 135.

* P. 492.

Plow. 281. 9 H. 5. 6.

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(1) An administrator *durante minori ætate* cannot be charged as *executor de son tort*, where he wastes the goods; because he had a lawful authority to possess them: but when the infant comes of age, he may bring an action of detinue for the goods in the possession of such an administrator; but the safest way is, to charge him upon the special matter, *Swinb.* 333.—See further as to the power of an administrator *durante minori ætate*, and its continuance, in *Vin. Abr.* Executors (M.)—*God. Orp. Leg.* 102.—*Com. Dig.* Administration (F.)—1 *Wood* 147.—*Curson's Supplement to Went. Off. Ex.* 119. 139.—*Bac. Abr.* Executor (B. 1.)

If

If a will be made by an ideot, and an executor appointed therein, and the executor take upon him the administration, and after the will is avoided for the weakness of the testator; in this case, it seems that all the acts the executor doth before the avoidance of the will, are good, and not to be avoided by the administrator.

36. What acts done by one executor or administrator, may be avoided by the subsequent executor or administrator, and what not.

3 H. 7. 14. If there be a will made and an executor appointed, and the ordinary cite the executor to come in and prove the will, and he doth not come, and thereupon the ordinary doth grant the administration to another; in this case, all acts done by the administrator are good, and shall bind the executor, if he may and shall afterwards take upon him the executorship. But otherwise it is where the ordinary doth grant the administration before the executor be cited to appear, or before the time given him to take upon him the administration; for in this case, nothing that he doth shall bind the executor.

Co. 6. 18. 19. Plow. 282. Co. 8. 143. 135. When there is an administration granted, and it is afterwards upon a suit by condition only repealed; in this case, all acts done by the first administrator are good and shall bind the subsequent administrator. But in case where the first administration is upon a suit by appeal by sentence annihilated and declared void, there all acts done by the first administrator are void, and shall not bind the subsequent administrator: And therefore if the ordinary of the diocese grant an administration that doth belong to the metropolitan to grant, (in which case, the administration is void,) all acts done by the administrator are void, and may be avoided by the succeeding administrator. But when the administration doth belong to the ordinary of the diocese to grant, and the metropolitan doth grant it, (in which case, it is only voidable,) in that case, all acts upon and by virtue of the first administration before the second administration is granted, are good.

Wilson v. Packman. M. 37. 38. Eliz. B. R. If an administration be granted to a stranger, and afterwards it is revoked and granted to the next of kin; in this case, all lawful acts done by the first administrator before, and hanging the suit, are good and unavoidable by the subsequent administrator; and yet perhaps if the first administrator waste the goods, it may be he may be charged for this by the subsequent administrator, or by a creditor. * P. 493.

Plow. 281. 281. Co. 6. 19. 34 H. 6. 14. Where the executor by the will is not to administer until a certain time; in this case, the administration of the goods is to be granted until that time, and all acts done by such an administrator before that time are good, and shall bind the executor. So where an executor is made, or an administration is granted upon condition, which is after broken, so that the executorship or administration is determined; yet, in this case, all acts done by him before this time are good.

4 H. 7. 13. Plow. 282. If there be a false and a true will, and the executor of the false will prove this will first, and afterwards the executor of the true will doth disprove and avoid the first will; in this case, he may also avoid all acts the first executor doth.

37. What shall be said a good bar in debt, or other action brought by, or against an executor or administrator, and what not.

Co. 5. 33. Dier 30. 80. Co. 8. 132 134. 21 H. 6 19. Dier 2. 27 H 8. 6. Co 9. 108. 2 H 4. 21. The same bars and pleas regularly, that a man may have to actions brought by the deceased himself in his life, a man may have to bar the action and suit of his executor or administrator after his death. But an executor or administrator may have, besides the same pleas and bars to actions

the deceaſed might have had, as *non eſt factum, per dureſſe, non aſſumpſit*, and the like, divers other pleas and bars to actions in reſpect of his eſtate and condition as executor or adminiſtrator; for if he never meddle with the goods and chattels of the deceaſed, and yet be ſued as executor or adminiſtrator, he may plead *ne unques*, *i. e.* he did never intermeddle as executor or adminiſtrator; and if this be found for him, this will bar the plaintiff: and if he do intermeddle, and take upon him the adminiſtration, he may plead, if the caſe be ſo, that he cannot recover the goods of the deceaſed; for he ſhall be charged for no more than what he can get in his poſſeſſion; or he may plead that he hath fully adminiſtred all the goods and chattels of the deceaſed, and hath nothing left to adminiſter; or he may plead, that he hath paid ſo much of his own money as the goods in his hands do amount unto; or if he be ſued for debts due by obligations, or ſuch like eſpecialties, entred into by the deceaſed, he may plead that there are debts due, and yet to pay, on judgments had againſt the deceaſed; or that there are debts due and yet to pay on recognizances or ſtatutes entred into by the deceaſed, and that he hath no more than enough to ſatisfy them; or he may plead that there are judgments had againſt him for other debts of the deceaſed in equal degree with the debt ſued for, and that he has no more than enough to diſcharge them; ſo as theſe former debts, on and for which theſe judgments were had and ſtatutes given, be *bonâ fide* due, and the judgments, recognizances, and ſtatutes in truth continued for the ſame: for if there be any fraud in the caſe, *viz.* that either the judgments, recognizances, or ſtatutes, were * at firſt entred into, or are afterwards continued, of purpoſe to deceive or delay others of their due debts, when either the debt is ſatisfied, or compounded for leſs, or the like; in theſe caſes, this plea will not ſerve; but this matter being diſcloſed by the plaintiffs pleading, he will avoid it: and if he be ſued for a debt due upon a ſimple contract or promiſe of the teſtator, he may plead there are debts to pay due by obligations and other eſpecialties, entred into by the deceaſed, and that he hath no more than enough to ſatisfy thoſe debts, and this will bar the plaintiff in his action: and therefore if an executor or adminiſtrator plead a judgment in bar of an action of debt upon an obligation, he muſt ſhew alſo that the ſuit, whereupon the judgment was had, was upon an obligation; for, if it were on a ſimple contract, it is no bar. And if the executor be ſued for debt on an obligation, he may plead he made voluntary payment of other debts due upon obligations, or gave new ſecurity for them in his own name before the ſuit began, and that he hath no more than enough to ſatisfy them. But to plead ſuch a voluntary payment or giving of new ſecurity, after ſuits begun upon this obligation now in ſuit, is no good plea. If an action be brought againſt an executor or adminiſtrator on an eſpecialty for money, it is no good plea in bar of this action to plead a ſtatute or recognizance with defeazance to perform covenants, when there is no covenant broken. If a ſuit be againſt an executor or adminiſtrator for a legacy, it ſeems it is no good plea to plead a bond, with condition for performance of covenants, or for the doing of any other collateral thing, that is contingent only, and not yet broken. It is no good plea in an action for an executor

* P. 494.

Cujus Trin. 37 Eliz. (z)

Trin. 39. Eliz. B. R

cutor or administrator to say, that the deceased was outlawed. (1.)

2 H. 6. 12. Dier 185. 80. Co. 9. 90. 94. 9 H. 6. 57. 34 H. 6. 45. Bro. Executor 141. 105. Lit. Bro. sect. 29. Kelw. 61. Bro. Executors, 164.

An executor or administrator may make himself chargeable of his own goods, either by omission; as when he being sued upon an obligation, or the like, and there is a judgment against him or the deceased in force, and he hath but enough to satisfy that judgment, and he doth not plead this in bar of the present action, but doth suffer the plaintiff to recover against him; in this case, he must satisfy this second debt out of his own estate; or by commission; and that either by doing; as when he doth any act that is a waste in him, and thereupon a *Devastavit* is returned against him; (for in this case he must answer so much as he hath wasted out of his own estate;) or by saying; as when a suit is brought against him, and he doth plead such a false plea therein as doth tend to the perpetual bar of the plaintiff in the action, and yet it is of a thing that doth lie within his perfect knowledge, as when he doth plead he is not executor, nor did ever administer as executor, and upon tryal of this issue against him it be found he is a * rightful or wrongful executor; in this case, he must satisfy this debt out of his own estate, whether he have assets or not, and the execution upon the judgment had in this suit shall be *de bonis propriis*. And if an executor or administrator be sued, and he plead to the action *plene administravit*, and upon trial it is found against him; in this case, if he have any of the goods of the deceased left in his hand, the execution shall be of them; but if he have none of the goods of the deceased left, the execution shall be, and he shall be charged for so much as is found to be in his hands, *de bonis propriis*. But where he is sued upon a promise made by the testator, and he plead *non assumpsit* to it; and where he is sued upon a deed made by the testator, and he plead *non est factum* to it, or the like; and these issues upon tryal are found against him; or when he shall confess the action, or suffer a judgment to go by default against him, or plead any vain plea; in all these cases, he shall not be chargeable of his own estate, neither shall the judgment and execution in these cases be *de bonis propriis*, but *de bonis testatoris* only for the debt, and *de bonis propriis* for the costs: and yet if an executor or administrator shall entreat a creditor to forbear his debt until a day, and then promise to pay him; by this promise he hath made himself chargeable as for his own debt; howbeit it shall be allowed him upon his account (2). But in all these cases, and such like, where a man shall be charged of his own estate, and the execution shall be *de bonis propriis*, it seems the judgment is always *de bonis testatoris*; and the course is this, the first execution is against the executor *de bonis testatoris*, and not *de bonis propriis*; and after a *devastavit* returned by the sheriff against the executor or administrator, and not before, a new execution is directed to the sheriff to levy the debt *de bonis testatoris*; and if there be none of them to be found in his hands, then to levy them

38. Where, and in what case, an executor or administrator shall be charged by his own act or pleading upon his own goods; and where execution shall be *de bonis propriis*; and where not.

* P. 495.

Atworth's case. Mich. 38. 39. Eliz. 34 H. 6. 45. 46 Ed. 3. 9. Fitz. Executor 9. Cc. 5. 32. 8. 134. Dier 185. 32.

(1) See fully as to pleadings in actions by or against executors and administrators, in *Com. Dig.* Abatement (F. 10.) Pleader (2 D. 1.)—*Vin. Abr.* Executors (Z. a. 2.) &c.—*Swinb.* 397.

(2) See accordingly, *God. Orp. Leg.* 199.—but this promise must be in writing, under the statute of frauds 29 *Car.* 2. *cap.* 3. §4.—See further in what cases an executor makes himself liable *de bonis propriis* by his promise to pay his testator's debts or legacies, in *Bac. Abr.* Executors, &c. (M. 2.).

de bonis propriis. And therefore if an executor or administrator be sued by a creditor, and the executor or administrator plead a *plene administravit* generally, or plead specially that he hath no more but to satisfy a judgment or the like; and upon trial this issue is found against him, and it is found he hath in all or part enough to satisfy the debt; in these cases the judgment is *de bonis testatoris*, and thereupon an execution is (as in other cases) to levy the debt *de bonis testatoris* in the hands of the executor or administrator, and for the costs *de bonis propriis*. And upon the return of the sheriff a special execution doth issue forth to levy the money *de bonis testatoris*: *Et si constare poterit* that he hath wasted the goods, then that he shall make the execution *de bonis propriis*. And thereupon also the plaintiff may if he will have a *capias* against the body, or an *elegit* against the lands of the executor or administrator, * and no other course of proceeding can or may be had against the executor or administrator in this case.

* P. 496.

Dier 210.

An action of debt was brought against two executors, and one of them did appear and confess the action, and the other made default, and thereupon judgment was given to recover against them both *de bonis testatoris* in their hands, and execution accordingly: and upon this execution the sheriff did return a *devastavit* against the executor that made default only, and hereupon a *scire facias* went out against him alone, and afterwards an execution against him alone *de bonis propris* (1).

Terms of the law. Co. super Lit. 374.

Assets in this case, is said to be where one dieth indebted and maketh his executor, or dieth intestate, and the executor or administator hath sufficient in goods or chattels or other profits to pay the debts or some part thereof; this is said to be assets in his hands, and for so much he shall be charged.

Assent. *Quid.*

39. What shall be said to be assets in the hands of an executor or administrator to charge him, or not.

All those goods and chattels, actions and commodities, which were the deceased's in right of action or possession as his own, and so continued to the time of his death, and which after his death the executor or administrator doth get into his hands as duly belonging to him in the right of his executorship and administration, and all such things as do come to the executor and administrator in lieu or by reason of that, and nothing else, shall be said to be assets in the hands of the executor or administrator to make him chargeable to a creditor or legatee. And herein these things are to be known; 1. That assets in the hands of one of the executors shall be said to be assets in the hands of all the executors. 2. That assets in any part of the world shall be said to be assets in every part of the world: and therefore if that point be in issue, and it appear that there is assets in the hands of any one of the executors, or in any county or place whatsoever, the jury must find that there is assets. 3. All goods and chattels of what nature or kind soever that are valuable as money, kine, corn, &c. shall be esteemed assets. But such things as are not valuable, as a presentation to a church, and the like, shall not be accounted assets. 4. All the goods and chattels that come to the executor or administrator in the right of their executorship or administration, and that are by law given to them by virtue thereof in the right of the deceased (for which see before

Kelw. 51.

Co. 6. 47.

Co. super Lit. 388.

Co. super Lit. 388. s. 34.

Dier 365. T Kelw. 81. 8

(1) See further in what cases an executor shall be charged *de bonis propriis*, in *Swinb.* 390.

Co. ſuper Lit. 54. Dier 362.

at *Numb.* 25.) and which are in poſſeſſion, ſhall be eſteemed aſſets in his hands. And therefore a feoffment, made to the uſe of the feoffor for life, and after to the uſe of his executors and aſſigns for twenty years, in this caſe, it ſeems this twenty years ſhall be ſaid to be aſſets in the hands of the executor of the feoffor. And goods pledged to the deceaſed and not redeemed, or the money wherewith it is redeemed, when it is redeemed, ſhall be ſaid to be aſſets in the hands of the * executor or adminiſtrator. And if the deceaſed doth appoint that the executors ſhall ſell his lands to pay his debts, the money, that is made of the land when it is ſold, ſhall be ſaid to be aſſets in his hands. 5. All the goods and chattels in action or in poſſibility at the time of the death of the deceaſed, that are afterwards recovered, and are gotten in poſſeſſion into the hands of the executor or adminiſtrator when they are ſo recovered, are eſteemed aſſets in his hands. But they are never accounted aſſets, until they are recovered and come in poſſeſſion; and therefore if there be debts owing to the deceaſed upon ſtatutes or obligations, or otherwiſe, theſe are never eſteemed aſſets in the hands of the executor or adminiſtrator, until he hath recovered them. So likewiſe if there be debt or damages recovered by a judgement had by the deceaſed, but no execution is done; until execution be made, this ſhall not be eſteemed aſſets in the hands of the executor or adminiſtrator. So if the executor bring an action of treſpaſs againſt another *de bonis aſportatis in vita teſtatoris*, and he have a judgment for damages; in this caſe, until he hath recovered it by execution, it ſhall not be eſteemed aſſets in his hands. And if the judgment be erroneous, and the execution avoidable; in this caſe, albeit it be recovered and gotten in poſſeſſion, yet it ſhall not be eſteemed aſſets. And therefore if one ſue another, and recover againſt him as adminiſtrator of *I. S.*; and after a teſtament made by *I. S.* is produced and proved, and thereby an executor is made; in this caſe, the money recovered by the adminiſtrator ſhall not be ſaid to be aſſets in his hands as to any of the creditors, becauſe the executor may recover it from him, or the debtor will have it again. And if the executor or adminiſtrator do never recover and get the thing into his poſſeſſion, he ſhall never be charged, eſpecially there where he hath done his beſt to get it and cannot. If one covenant to make a leaſe for years to the deceaſed, his executors or adminiſtrators, and after his death the leaſe is made to the executor or adminiſtrator accordingly; in this caſe, this leaſe ſhall be ſaid to be aſſets in his hands, and he ſhall be chargeable for ſo much to any creditor. And whatſoever the executor or adminiſtrator muſt be forced to ſue for by the name of executor or adminiſtrator, being recovered, ſhall be eſteemed aſſets in his hands. 6. Albeit the thing be extinct and gone as to the executor and adminiſtrator himſelf, yet it may have its being and be accounted aſſets as to the creditors and legatees. And therefore if an executor or adminiſtrator have a leaſe for years of land in the right of the deceaſed, and afterwards he doth purchaſe the fee-ſimple of the land (whereby the leaſe is drowned) yet in this caſe this leaſe ſhall continue to be aſſets as to the creditors and legatees ſtill. And if the debtee make the * debtor his executor, or the debtee die in- teſtate,

80 H. 7. 4. Bro. Aſſets 12.

* P. 497.

Co. ſuper Lit. 124. 5. 31. Bro. Aſſets 24. Dier 264. 122. 2 H. 4. 22. Co. 6. 58. Kelw. 67. Dier 362.

Curia Mich. 13. B. R.

Co. 1. 98. Plow. 84. 252.

Co. 5. 34.

Co. 1. 87. Bro. Leaſes 63.

Trin. 7 Jac. B. R. Sherman's caſe. Co. 8. 136.

* P. 498.

teſtate, and the adminiſtration is committed to the debtor, in theſe caſes, this debt ſhall be ſaid to continue, and ſhall be eſteemed aſſets for ſo much as to other creditors. And if a woman executrix have goods worth twenty pounds, and ſhe marry with one of the creditors to whom twenty pounds are owing; in this caſe, it ſeems the huſband may not retain the goods to pay himſelf, but they ſhall be aſſets to other creditors. And yet, if the debtor make the debtee his executor, he may retain ſo much as to ſatisfy his own debt; and that he doth ſo retain ſhall not be ſaid to be aſſets in his hands as to any other creditor. And if *I. S.* have goods to the value of twenty pounds, and he is bound to *B.* and *C.* in twenty pounds a-piece, and he dieth inteſtate, and after *D.* doth adminiſter, and then *B.* dieth, and maketh *D.* his executor; in this caſe, *D.* may retain this to ſatisfy his own debt, and it ſhall not be ſaid to be aſſets in his hands as to any other. 7. The goods and chattels of other men in the hands of the executor or adminiſtrator, that were in the poſſeſſion of the deceaſed, if he had no right to them, or if he had, and they do not belong to the executor, will not make the executor or adminiſtrator chargeable; for theſe ſhall not be eſteemed aſſets in his hands. And therefore if the goods of another man be amongſt the goods of the deceaſed, and theſe come altogether into the hands of the executor or adminiſtrator; theſe goods that are the goods of another ſhall not be ſaid to be aſſets in the hands of the executor or adminiſtrator. And if the executor doth receive a rent that doth belong to the heir; this rent ſhall not be ſaid to be aſſets in his hands: and hence it is, that if the deceaſed were outlawed at the time of his death, that his goods and chattels are not to be accounted aſſets, for they are none of his. 8. If an executor of his own wrong, to whom twenty pounds are owing, doth enter upon ſo much of the goods of the deceaſed as is worth twenty pounds, intending to pay himſelf; this ſhall be eſteemed aſſets in his hands to make him chargeable for ſo much to any creditor or legatee. 9. If the deceaſed have goods worth twenty pounds, and owe twenty pounds to *A.* and ten pounds to *B.* and he compound with *A.* for ten pounds; in this caſe, the executor ſhall be ſaid to have aſſets, and be charged to pay the debt of *B.* alſo. 10. If a man have a leaſe for years worth twenty pounds *per annum* at the rent of five pounds and he die; in this caſe, not the whole value of the land, but ſo much as is above the rent, ſhall be ſaid to be aſſets in the hands of the executor or adminiſtrator (1).

Burnet's caſes, Hil. 8 Jac. Plow. 184.

Kelw. 63. Co. 6. 58. Dier 361.

Doct. & St. lib. 2. cap. 31.

Co. 5. 30. Dier 2.

27 H. 8. 6.

Co. 5. 31. 10 H. 7. 5.

40. Probate. *Quid.* *Quotuplex.* The probate of a teſtament is the producing and inſinuating of it before the eccleſiaſtical judge, ordinary of the place where the party dieth, or other that hath power to take the ſame. And this is done in two ſorts, either in common form, *i. e.* upon the oath of the executor or party exhibiting it upon his credulity * that the will exhibited is the laſt will and teſtament of the party deceaſed, which is the ordinary courſe; and this

Swinb. 261, 264.

* P. 499.

(1) See more amply what ſhall be deemed aſſets in the hands of the executor, in *Bac. Abr.* Executors, &c. (H.)—*God. Orp. Leg.* 180.—*Vin. Abr.* Executors (C. a.)—1 *Atk.* 163.—2 *Atk.* 206.—The editor has, during the preſent chapter, occaſionally omitted inſerting references to the latteſt reporters, under a preſumption, that the caſes contained in them are either inſerted in the edition of *Bacon's Abridgment* lately publiſhed, or will be ſo in the edition of *Comyn's Digeſt* now in the preſs.

the ordinary may accept if he will. Or *per testes*, *i. e.* which is, when over and besides his oath he doth also produce witnesses, or maketh other proof to confirm the same; and that, in the presence of such as may pretend any interest in the goods of the deceased, or at least in their absence after they have been lawfully summoned to see such will proved if they think good. And this course is used only where there is a suspicion of the will, and a caveat is entred; or where there is a fear of contention and strife between the kindred and friends of the party deceased about his goods; for a will proved in common form may be called into question at any time thirty years after; and when the will is thus exhibited into the bishop's court, the same is to be kept by his officers, and the copy thereof in parchment under the bishop's seal of his office to be certified and delivered, which parchment so sealed is called the will proved.

Co. super Lit. 292. Perk. sect. 482.

41. Where the probate of a will is necessary and where not; and by and before whom: and in what time it must be proved.

The probate of the will (as having respect to the goods and chattels) is in some respect necessary; for howsoever, as touching any freehold of lands devised, it is not at all material; and howsoever the executor before probate may receive and release debts, and do most other acts as executor, yet he cannot sue for any debt due to the testator. And if the executor delay the probate, the ordinary may by process compel him to come in and accept of or refuse the executorship. And when it is proved, it must be proved by the executors or one of them at least; and if all the goods of the deceased be within the same diocess wherein he lived and died, the executor must prove it before the ordinary of the diocess, or before his lawful commissary or deputy, or before the archdeacon or his deputy or commissary (as their composition is), or if the goods be in a peculiar, then before him that is judge of that peculiar; or if the goods be within two peculiars, then before the ordinary of the diocess wherein these two peculiars lie. But if there be *bona notabilia* in the case, *viz.* that the testator have goods or chattels at the time of his death of the value of five pounds or more, lying in two or more counties, or have good debts upon especialties (as some say), for otherwise they follow the person; or have any especialties (as others say) lying in other counties for debt, so that there be of goods and chattels or good debts to the value of five pounds in any other diocess than that wherein the testator led his life and died, then the probate doth belong to the archbishop of that province wherein it is, unless the ordinary of the same diocess have the probate by composition between him and the metropolitan; for otherwise there must be several * probates for the goods in every diocess (as anciently was used in these cases) (1). But if a man die in his journey in another diocess, and have more than five pounds goods about him, this shall not be said to be *bona notabilia*, but the will may be proved before the ordinary of the place where the deceased lived and his estate doth lie. And except it be in cases where men have *bona notabilia*, the officers of the courts of the metropolitans are not to cite men out of their own

Perk. sect. 491. 462. 486. Co. 9. 36. Fitz. Tesament 4, 3. 5. Plow. 280. Stat. 23 H. 8. c. 9. 21 H. 8. c. 5. See before at numb. 21.

Swinb. part. 6. sect. 11.

* P. 500.

Stat. 23 H. 8. cap. 9.

(1) Five pounds is the sum or value of notable goods; but where, by composition or custom in any county, *bona notabilia* are rated at a greater sum, the same is to continue unaltered; as in the diocess of *London*, it is ten pounds by composition. 4 *Burn's Ecc. Law*. 179.—4 *Inst.* 335.—What shall be deemed *bona notabilia*, See *Vin. Abr.* Executors (H.)—*God. Orp. Leg.* 69.—*Com. Dig.* Administrator (B. 4.)

diocess;

dioceſs; and, to diſcover this matter, it is the duty of the ordinary of the dioceſs, when any man comes to prove a will, to give him an oath, and examine him whether he know of, or do believe, there are any goods to the value of five pounds lying in any other dioceſs at the time of the teſtator's death, and if he hear of any to diſmiſs them to the prerogative court, and to give them notice of it: alſo in ſome places, the Lords of manors have the probate of all the wills within their manor by cuſtom of the place; and in thoſe places it muſt be proved there, and not elſewhere. And when an executor is bound to prove the will before the ordinary as before, the ordinary may give him what time to do it he doth think fit, and, when he doth prove it, the ordinary doth take an oath of him to adminiſter the goods faithfully, and to take bond of him alſo if he pleaſe; but this ſome do omit (1). Fitz. Teſtament 4. 5.

And now becauſe lands are oftentimes conveyed by the ſeveral kinds of aſſurance aforeſaid unto one man, but to the uſe of another, and to the intent that another ſhall take the profits of it, we muſt of neceſſity hear ſomewhat of the learning of uſes, and then we ſhall have done.

(1) See fully before whom a will is to be proved, and in what manner, in *Swinb.* 427.—*Treat. of Equity* 108.—*Went.* 44.—2 *Black. Com.* 508.—*Com. Dig.* Adminiſtration (B. 6.)—*Bac. Abr.* Executors, &c. (E.)—*Vin. Abr.* Executors (B. 2.)—4 *Burn's Ecc. Law* 176.

CHAP. XXIV.

CHAP. XXIV.

Of a Use.

Cq. 1. 121, 122. See the addition to juſtice Doderidge's Treatiſe. Co. ſuper Lit. 271, 272.

A USE is the profit or benefit of lands or tenements; or, as others define it, the equity and honeſty to hold the land in *conſcientia boni viri:* or, as others define it more fully; It is a truſt or confidence repoſed in ſome other, which is not iſſuing out of the land, but as a thing collateral annexed in privity to the eſtate of the land, and to the perſon touching the land; ſo that he for whom he is truſted ſhall take the profit of the land, and the terre-tenant ſhall diſpoſe of it according to his direction: as for an example, if a feoffment be made to *I. S.* and his heirs, to the uſe, profit or behoof of *W. S.* and his heirs; in this caſe, heretofore *I. S.* had the eſtate and property of the land, but *W. S.* had and was to have the profits in honeſty and equity. So if one agree with *W. S.* for a piece of land for twenty pounds and pay him the money, but hath no aſſurance of the land, yet the equity and honeſty to have this land is in him that hath contracted and paid his money for it: and this truſt was called the uſe of the land; and hence came the courſe in conveyances to ſet down in the *Habendum*, to whoſe uſe; as *Habendum* to *A.* and his heirs, to the uſe of *A.* and his heirs: and he for whom this truſt is, and that ought to have the profit of the land by conveyance as aforeſaid, is called *ceſtuy que uſe*. There is a uſe alſo of goods and chattels, which is properly called a truſt or confidence, for one may have ſuch things to the uſe of another.

* P. 501.

1. Uſe. *Quid.*

Ceſtuy que uſe. Truſt or confidence. *Quid.*

Doct. & St. 95. Perk. ſect. 533. Co. 2, 58. 9 11. Dier 18. 146.

A uſe is either expreſs; *i. e.* when the uſe or intent is openly declared and expreſſed between the parties, upon the making of the eſtate of land, whereunto the uſe is annexed; as when a feoffment is made of land to *I. S.* and his heirs, to the uſe of *W. S.* and the heirs of, or heirs males of, the body of the ſaid *W. S.* or to the end and intent that *W. S.* and his heirs, or *W. S.* and the heirs of his body, ſhall take the profits of it, or the like; or when I covenant to ſtand ſeized of the land to the uſe of my wife for life, and after of my eldeſt ſon, and the heirs of his body, or the like. Or, it is implied; *i. e.* when the uſe is not declared upon the agreement between the parties, but is left to the conſtruction and made by the operation of law; as when a man ſeized of land doth make a feoffment in fee, or doth levy a fine, or ſuffer a common recovery of it to another, without any conſideration, and it is not agreed nor declared to what uſe or intent it ſhall be; this by conſtruction of law ſhall be to the uſe of the feoffor, conuſor, or recoveree: but if there be any conſideration of money, or other thing, paid or given, or any rent or tenure reſerved, then, by conſtruction of law, it ſhall be to the uſe of the feoffee, conuſee, or recoverer: for otherwiſe the law preſumeth, that the intent of him that did part with the land was ſo, (*viz.*) that the other ſhould have the property of the land to his uſe, and that he himſelf ſhould take the profits of it. So when one doth bargain and ſell his land for

2. *Quotuplex.*

* P. 502.

money to another, and no use is expressed; in this case, the law doth say, it shall be to the use of the bargainee and his heirs. A use also is either in *esse*, and that in possession, rever- Co. 1. 121.
sion, or remainder; as when a feoffment is made to *I. S.* to the use of *I. W.* and his heirs, or to the use of *I. W.* and after to the use of *I. D.* and the heirs males of his body, and after to the use of *S. T.* and his heirs for ever; Or, it is in *posse*, or in contingency; as when by possibility, it may happen to be in possession, reversion, or remainder; as where a use is limited to me for life, and after to him that shall be my first son in tail, this is only the possibility of a use, for it may or may not be.

3. The nature, incidents, and original of it.

A use at the common law, before the statute hereafter spoken of was made, was, and, where that statute doth not take place, is, nothing but a meer confidence and trust, collateral to and distinct from the land, annexed in privity to the estate, and to the person touching the land, to this purpose, that *cestuy que use* should take the profit of the land, and the feoffee or terre-tenant that was trusted should make estates, and otherwise dispose of the land as the *cestuy que use* in his life, or at his death by his last will and testament, should direct and appoint; and if he made no disposition, then that it should go to his heir; so that the feoffee had the free-hold or sole property of the thing in him, and *cestuy que use* had neither *jus in re* nor *jus ad rem*, (for if he against the will of the feoffee had entred into the land, he had been a trespassor,) but a bare confidence or trust, for which the *cestuy que use* had no remedy, but in chancery upon breach of the trust, and there to have the feoffee imprisoned until he perform the trust according to the order of the court. And these uses, to some purposes, were reputed in law as chattels, and therefore were devisable by will; and to some purposes as hereditaments, and a kind of inheritance of which there was a *possessio fratris*, *&c.* and to some purposes, neither chattels nor hereditaments; for they were not esteemed assets in the heir or executor; neither were they reputed as commons, rents, conditions, and such like inheritances, which are discontinued or taken away by the alienation of the terre-tenant, escheat, disseisin, *&c.* but a use is not so. Co. in Chudleigh's case, in toto, & Shelley's case. Kelw. 160. Dier 12. Bro. Feoffment all uses in to a Conscience. 25.

Incidents of it.

And to every of these uses, there were two inseparable incidents, confidence in the person, and privity in the estate expressed by the parties, or implied by the law; and when either of these failed, the use was either gone for ever or suspended for a time at the *least: and therefore if the feoffee to use, upon good consideration had enfeoffed another of the land that had not notice of the use, the use had been gone for ever; because howsoever here was a privity of estate, yet here was no confidence in the person: but if the feoffment had been without consideration to such a one; in this case, the use had remained still, because the law did imply a notice: So also it seems the law was when it was made in consideration of marriage only. And if a disseisor, abator, or intrudor, had come to the possession of the land whereof the use was, albeit he had notice of the use, yet the use was suspended during their possession, and they should not have been seized to use as the feoffee was; for they come not to the land in the *per* but in the *post*. And if a lord by escheat, lord of a villain, or one that

* P. 503.

Trin. 17 Jac. Cancellaria.

that had entred for mortmain, or that had recovered in a *ceſſavit*, &c. had come to ſuch land and had notice of the uſe, the uſe had been gone for ever; for theſe came to the land in the *poſt* and above the uſe; and tenant in dower, and by the curteſy, ſhould not be ſeized to uſes in being, for all theſe wanted privity of eſtate: And if there had been tenant for life, the remainder in fee to the uſe of another, and the tenant for life had made a feoffment in fee to one that had notice of the uſes, this ſecond feoffee ſhould not have ſtood ſeized to the firſt uſes: So if the huſband had made a feoffment in fee of the land of his wife, upon conſideration, and without any uſe expreſſed, the wife ſhould not have had a *Subpœna*; becauſe the feoffee was not in privity of eſtate of the wife; and if *ceſtuy que uſe* for life or in tail, the remainder in tail with divers remainders over in uſe, had made a feoffment to one that had notice, he ſhould not have been ſeized to the firſt uſes *cauſâ quâ ſupra*. But otherwiſe it is of commons, advowſons, and ſuch like appendants or appurtenants; for if tenant in tail, or huſband in right of his wife, make a feoffment of a manor, or of part of it, with an advowſon appendant; the advowſon, at leaſt after preſentment, ſhall paſs as appendant to the manor, or to part of the manor, and not to the eſtate of the land which is diſcontinued by the feoffment. So a diſſeiſor, abator, intruder, or the lord by eſcheat, or the like, ſhall have theſe things as annexed to the land or the poſſeſſion of the land; ſo that there is a difference between a uſe, a warranty, and ſuch like things that are annexed to the eſtate of the land in privity, and commons, advowſons, and other hereditaments that are annexed to the poſſeſſion of the land.

Doct. & St. 96. Co. 1. 123. 124. Stat. 27 H. 8. c. 10. in the preamble.

The original of it, and why ſo much lands were put in uſe.

And theſe uſes began firſt when the cuſtom of property began and was brought in, that one man knew his own from another man's, and then was to enjoy his own, and not to be deprived of it without conſent or order of law; for then he that had land, had two things in him, a poſſeſſion of the land, and power to take the profits of it; and thoſe being to be diſtinguiſhed, he might give the * free-hold or poſſeſſion to another, and take the profits himſelf; and they were the rather allowed by the law for a time as reaſonable, becauſe they gave a man power to diſpoſe of his land by will, which otherwiſe he could not have done but in ſome ſpecial caſes by cuſtom of the place (1): but in time this uſe was turned into an abuſe, and the greateſt part of all the lands in the kingdom, eſpecially in the time of the broils between the houſes of *York* and *Lancaſter*, were put in uſe, partly of fraud, and partly of fear, which produced not a few inconveniences; for thereby many were deceived of their juſt and reaſonable rights (2); as namely, a man that had cauſe to ſue for his land, knew not againſt whom to bring his action, or who was owner of it; the wife was defrauded of her thirds; the huſband of being tenant by the curteſy; the lord of his wardſhip, relief, herriot, and eſcheat; the creditor of his extent for debt; the poor tenant of his leaſe, and other purchaſers of their purchaſe: for theſe

* P. 504.

The miſchief of uſes.

(1) For the nature, origin, and introduction of uſes, ſee *Gilb. Law of Uſes* 3.—2 *Bl. Com.* 327.—*Bac. Law Tracts* 302.—1 *Wood* 625.—*Vin. Abr.* Uſes (A. 3.)

(2) About the reign of *Edw. IV.* courts of equity firſt began to reduce uſes into a kind of regular ſyſtem, 2 *Bl. Com.* 329. for before that time, there are not ſix caſes to be found relating to the doctrine of uſes.—See *Bac. Tracts* 313.

rights and duties were given by the law from him that was owner of the land and none other, which at this time was the feoffee of truſt; and ſo the feoffor, the old owner of the land, ſhould take the profits, and leave the power to diſpoſe of the land at his diſcretion to the feoffee; and yet the feoffee was not ſuch a tenant of the land, as that his wife might have dower; or the land be extended for his debt; or that he might forfeit it for felony or treaſon; or that his heir ſhould be in ward for it; or any duty of tenure fall to the lord by his death; or that he could make any eſtates of it (1): alſo lands were many times conveyed by laſt wills by word only, and ſometimes by tokens only in time of great extremity of weakneſs; and many perjuries for tryal of ſecret uſes were daily committed. All which having been eſpied, have been laboured to be cured and holpen by divers particular acts of parliament in all ſucceeding ages; but the makers of theſe laws, finding the continuance of theſe uſes ſo miſchievous, that they did over-reach the policy of all laws, for a general remedy, and a perfect cure of all the ſaid miſchiefs and abuſes, have at laſt provided,—that where any perſons are, or ſhall be, ſeized of any lands to the uſe or truſt of any other, by reaſon of any bargain, ſale, feoffment, fine, recovery, contract, agreement or otherwiſe by any means whatſoever,—*ceſtuy que uſe* or *truſt*, that hath any ſuch uſe in fee-ſimple, for term of life, or years, or otherwiſe, or any uſe in reverſion or remainder, &c. ſhall have the poſſeſſion of the land in ſuch quality, manner and condition as he had the uſe or truſt (2). And where any one is ſeized of lands to the uſe or intent that another ſhall have a yearly rent out of the ſame lands, *ceſtuy que uſe* of the rent ſhall be deemed in poſſeſſion thereof of like eſtate as he had the uſe: by which ſtatute the uſe and poſſeſſion of land is now at this day coupled, conjoined and married, with an indiſſoluble knot, ſo as they cannot now ſtand a-part and divided, but he that hath * the one muſt have the other, and the one doth enſue the other as the ſhadow doth the body; and therefore now upon fines, recoveries, and feoffments, the eſtate doth ſettle as the uſe and intent of the parties is declared by word or writing before the act done: as for example, if a writing be made between two or more, that one of them ſhall levy a fine, make a feoffment, or ſuffer a recovery to the other, to the uſe and intent that one of them, or another man, ſhall have it for life, and after another in tail, and after a third in fee-ſimple; in this caſe, the law ſettleth the eſtate according to the uſe and intent declared, ſo that now what eſtate a man hath in the uſe, the ſame he hath in the poſſeſſion. But herein for the more full underſtanding of this ſtatute, and the law at this day, it muſt be obſerved, that this ſtatute doth not extend to all manner of uſes, neither are all uſes executed and united to the poſſeſſion hereby; for, to every execution of a uſe within this ſtatute, four things are requiſite: 1. That there be a perſon ſeized. 2. That there be a *ceſtuy que uſe in eſſe*. 3. That there be a uſe in *eſſe* in poſſeſſion, reverſion, or remainder. 4. That the eſtate, out of which the uſes do ariſe, be veſted in *ceſtuy que uſe*: ſo that when theſe four, *viz.* ſeiſin

Uſes and poſſeſſions united.

* P. 505.

To what uſes the ſtatute of 27 *H.* 8. doth extend, and to what not.

Stat. 1 R. 2. c. 9. 4 H. 4. c. 7. 11 H. 6. c. 3. 1 R. 3. c. 1. 4 H. 7. c. 17. 1 H. 7. c. 1. 19 H. 7. c. 15. 27 H. 8. c. 10.

Co. 1. 126. 136. Plow. 391.

(1) See accordingly *Bac. Tracts* 153.—But ſee *Co. Lit.* 76. b.—*Tenk. Cent.* 4. *caſe* 92.

(2) See the words of the ſtatute 27 *H.* 8. *c.* 10. and the references thereto in the margin of *Ruffhead's* and *Pickering's* edit. of the *Statutes*.—And for ſome remarks on the operation of the words of that ſtatute, ſee *Fearne on Cont. Rem.* 3d edit. 226.

in

in the feoffees, *ceſtuy que uſe in rerum natura*, *uſe in eſſe*, and that the eſtate of the feoffees doth veſt *in ceſtuy que uſe*, then there is an execution of the uſe within this ſtatute; but if any of theſe fail, there is no execution of the uſe within this ſtatute: and therefore it is agreed that this ſtatute doth not execute any uſe, but only uſes in *eſſe*; ſo that the right of a preſent uſe, and a future or contingent uſe, are excluded until they come in *eſſe*; and then the ſtatute doth execute them alſo, if no alteration be of the eſtate of the land before. And if *ceſtuy que uſe* in tail, with divers uſes in remainder, had made a feoffment and dyed before the ſtatute, no execution ſhould have been of this right of a uſe until entry by the feoffees. So if *ceſtuy que uſe* in poſſeſſion had made a feoffment before the ſtatute; no right of the uſe in poſſeſſion or remainder ſhall be executed by the ſtatute until the entry by the feoffees: So if a feoffment had been made before the ſtatute to the uſe of the feoffee for life, and after to the uſes of others in remainder, and the feoffee had made a feoffment in fee to another; this uſe ſhall not be re-continued, or the re-poſſeſſion of the land executed unto it, by this ſtatute; ſo that the right of uſes in *eſſe*, and uſes in contingency, until they happen to be in *eſſe*, remain at the common law, as they were before the ſtatute; and therefore if the eſtate of the feoffees be in ſuch caſes deveſted by diſſeiſin; or the king, or a corporation, or an alien, or a perſon attaint, &c. be enfeoffed of the land before the uſe come in *eſſe*; or if the land be aliened *bona fide* upon conſideration to one that hath not notice of the uſe; this uſe can never be executed until theſe poſſeſſions be removed by lawful entry or * action of the feoffees; and if their entry and action be barred, the uſe is gone for ever, and the party grieved thereby hath no remedy but in chancery: and therefore if *ceſtuy que uſe* in tail, the remainder in tail reſtrained with a clauſe of perpetuity, be diſſeiſed; no uſe in contingency can be executed by this ſtatute: and if before the ſtatute, a feoffment had been made in fee to the uſe of *I. S.* for life, and after to the uſe of the right heirs of *I. N.* and the feoffees had been diſſeiſed, and then the ſtatute had been made, and after *I. N.* dye, and after his death *I. S.* dye; this uſe ſhall never be executed in the right heir of *I. N.* And ſo alſo if a diſſeiſin be after the ſtatute and before the death of *I. N.* no poſſeſſion ſhall be executed in the right heir of *I. N.* Alſo uſes that need no execution by the ſtatute; as when a man doth convey land to *I. S.* and his heirs, to the uſe of *I. S.* and his heirs; this doth not need help of this ſtatute. Alſo uſes that are againſt the rules of the common law, ſhall not be executed by this ſtatute: and therefore if a feoffment be made to the uſe of *A.* for life, and after to the uſe of every perſon that ſhall be his heir one after another for term of his life; or if one make a feoffment to the uſe of another in tail, with divers remainders over, with a proviſo that neither of them ſhall diſcontinue or alien, &c. theſe uſes ſhall not be executed, becauſe theſe limitations are wholly void; and in theſe caſes it ſeems there is no remedy to be had in chancery againſt the feoffees. So that out of all this it appeareth, that ſome uſes are executed preſently, as uſes in *eſſe*; and ſome are executed by matter *ex poſt facto*, if they be according to law, and come in *eſſe* in due time; but if they be uſes invented and limited in a new manner, and not according to the ancient

Co. 1. 126. Dier 58. 88. 330.

* P. 506.

Co. 1. 138.

common law, they are altogether void, and extinguished and abolished by this ſtatute: and where lands are conveyed to others in truſt after this or the like manner, *viz.* that the feoffees ſhall take the profits, and deliver them to the feoffor and his heirs, *&c.* or that the feoffees ſhall convey it to the heir of the feoffor at his age of twenty one years: and where lands are conveyed to certain uſes expreſſed and declared, and there be other ſecret uſes and intents agreed upon between the parties; theſe uſes or truſts are not within this ſtatute, neither will the ſtatute execute them, but they remain as they were before the ſtatute, determinable in chancery. Alſo leaſes for years of lands in uſe, that have their being before, and are granted over in uſe, are not executed by this ſtatute: and therefore if a leſſee for years of land, grant or aſſign over his eſtate to *A.* and *B.* and their aſſigns, to the uſe of the grantor and his wife for the term of their lives; this uſe or truſt is out of this ſtatute, and not executed thereby; and therefore in this caſe all the eſtate is in *A.* and *B.* and the grantor hath nothing but a uſe, for which he hath his remedy in chancery. So if one * be ſeiſed of land in fee, and he bargain and ſell it, or make a leaſe of it to another in truſt, and for the benefit of a third perſon; this is but a chancery truſt, *&c.* in this third perſon, as was held clearly. *M.* 8, *Car. B. R.* And yet if a feoffment be made to the uſe of *I. S.* and his aſſigns for the term of twenty years; this term of years ſhall be executed by the ſtatute: and ſo in all ſuch like caſes and queſtions of truſt, and uſes, that are not within the ſtatute of uſes, the law is now as it was before the ſame ſtatute was made, and all thoſe matters are determinable in chancery; for as the queſtions of uſes and truſts, that are within the ſtatute, are to be decided and ruled by the judges of the common law, ſo are all other queſtions of uſes and truſts, that are out of the ſtatute, to be ruled and decided by the judges of the chancery (1).

Dier 369. 35b. Cromp. Jur. 65.

* P. 507.

To

(1) It ſeems to have been the evident intention of the legiſlature, when they made the ſtatute 27 *Hen.* 8. *c.* 10. to aboliſh uſes, by transferring the poſſeſſion to the uſe; but the ſtrict conſtruction of that ſtatute defeated the intent of it, and gave riſe to *truſts* of lands, which are of the ſame nature as *uſes* were before the ſtatute; ſo that as Lord *Hardwicke* obſerved, in 1 *Atk.* 591. *A ſtatute made upon great conſideration, introduced in a ſolemn and pompous manner, by this ſtrict conſtruction, has had no other effect, than to add, at moſt, three words to a conveyance.*—There are three direct modes of *creating* a *truſt* eſtate. 1*ſt*. Where a man ſeiſed in fee, raiſes a term for years, and limits it in truſt for *A. &c.* for this the ſtatute cannot execute; the termor not being *ſeiſed.*—2*dly* Where lands are limited to the uſe of *A.* in truſt to permit *B.* to receive the rents and profits; for the ſtatute can only execute the firſt uſe.—3*dly*. Where lands are limited to truſtees to receive and pay over the rents and profits to ſuch and ſuch perſons; for here the lands muſt remain in them, to anſwer theſe purpoſes. 1 *Ab. Eq.* 383.—*Truſt* eſtates may alſo ariſe by *implication* in two ſeveral ways. 1*ſt*. Where a conveyance has been taken in the name of one man, and the purchaſe-money paid by another; or 2*dly*. Where the owner of an eſtate has made a voluntary conveyance of it, and made a declaration of truſt as to one part of the eſtate, and has been ſilent as to the other part of it. Theſe are ſaid to be the only two inſtances of truſts that have been allowed to ariſe by operation of law, ſince the ſtatute of frauds; unleſs where there has been a plain and expreſs fraud in gaining a conveyance from another, which may be a reaſon for making the grantee in that conveyance to be conſidered merely as a truſtee.—See *Lloyd* v. *Spillit*, *Barnard.* 384.—*Truſt* eſtates are to be governed by the ſame rules, and are within the ſame reaſon, as *legal* eſtates (1 *P. Wms.* 109.) and if there were not the ſame rule of property in all courts, things would be at ſea, and there would be the utmoſt uncertainty (2 *P. Wms.* 713.)——and Mr. Juſtice *Blackſtone* (2 *Comm.* 337.) upon this ſubject, ſays, "courts of equity "conſider a *truſt* eſtate (either when expreſsly declared or reſulting by neceſſary implication) as equivalent "to the *legal* ownerſhip, governed by the ſame rules of property, and liable to every charge in equity which "the other is ſubject to in law.—The *truſtee* is conſidered as merely the inſtrument of conveyance, and can in "no other ſhape affect the eſtate, unleſs by alienation for a valuable conſideration to a purchaſer without "notice, which, as *ceſtuy que uſe* is generally in poſſeſſion of the land, is a thing that can rarely happen.—The "*truſt* will deſcend, may be aliened, is liable to debts, to forfeiture, to leaſes and other incumbrances, nay even "to the curteſy of the huſband, as if it was an eſtate at law.—It has not yet indeed been ſubject to dower, more "from a cautious adherence to ſome haſty precedents, than from any well grounded principle. It hath alſo "been held not liable to eſcheat to the Lord, in conſequence of attainder or want of heirs, becauſe the *truſt*

Co. super 1 it. 271. Plow. 301.

To make a good uſe, or to make a uſe to riſe, eſpecially ſuch a uſe as may be within the ſtatute, reſpect muſt be had to divers things. 1. To the ways or means of creating and raiſing of uſes, wherein is to be obſerved, that albeit the quality of the uſes be changed in moſt caſes by the ſtatute of uſes, yet uſes, and uſes within this ſtatute, are, and may be raiſed, as they might before the ſtatute, either by tranſmutation of the eſtate, as by fine, feoffment, common recovery, &c. or out of the eſtate of the owner of the land, as by bargain and ſale, by deed indented and inrolled, or by covenant to ſtand ſeiſed to uſes upon good conſideration; and therefore a fine, feoffment, or recovery may be had of land to the uſe and intent, that either of the parties thereunto or others ſhall have it for any time or eſtate; and by this means what uſes and conſequently what eſtates a man will, may be raiſed and created: and in theſe caſes the conuſor, feoffor, or recoveree, may appoint the uſe of the ſame fine, feoffment, or recovery to whom he will, without any reſpect of marriage, money, kindred, or the like; for in this caſe, his will

Dier 186.

guideth the equity of the eſtate: or if a man make a leaſe to *A.* for life, to the uſe of *B.* for life; this is a good uſe and eſtate in *B.* during the life of *A.*; or if a man by bargain and

Co. 6. 68.

ſale for good conſideration ſell his land to another; hereby the uſe will riſe according to the eſtate bargained and ſold unto the

Dier 155. Co. 2. 36. 7. 40. 8. 93. 4. 17. See Bargain and Sale.

bargainee; but in this caſe, if it be an eſtate of freehold, as of fee-ſimple, fee-tail, or for life, that is ſold; the bargain and ſale muſt be made by deed indented and inrolled within ſix months after (1), in ſome of the courts at *Weſtminſter*, or in the ſeſſions rolls of the ſhire where the land lieth, (except it be in

Co. 2. 35. 8. 94.

cities and corporate towns where they uſe to inroll deeds,) otherwiſe no uſe will riſe by it; but if it be an eſtate or term for years only that is ſold, there the uſe will riſe well enough without any ſuch matter; or if a man ſeiſed of land in fee, covenant to ſtand ſeiſed of it to the uſe of his wife, children brethren, or other kinſfolk for * life, in fee-ſimple, or fee-tail; * P. 508. or if one ſeiſed of land in fee-ſimple covenant to ſtand ſeiſed of it to the uſe of a woman he is to marry; or to the uſe of a woman, his ſon, or other kinſman is to marry, or the like; hereby the uſes and conſequently the eſtates will riſe accordingly. And in theſe caſes there is no need it ſhould be by deed indented, &c. or that the deed be inrolled; for uſes may be

Cromp. Jur. 61, 60. Plow. 301. 308. and the better opinion of the Judges in Garbin's caſe. 38 Eliz.

raiſed by deed poll as well as by deed indented. Alſo uſes may be created (as ſome hold) by word or parol agreement as well as by deed or writing: for it is ſaid it hath been adjudged, that if a man ſay to his ſon, and a woman that his ſon is to marry, that in conſideration of the ſame marriage they ſhall have the land to them two in tail; that hereby a good eſtate tail will ariſe after the marriage: and that where one doth by word without deed grant to his ſon and to his wife in tail land in conſideration of their marriage, that it was agreed by all the judges that the uſe did riſe upon this agreement. Howſoever it is moſt ſafe in theſe caſes to do it by deed and in writing; for *Dier* 296.

1. What ſhall be ſaid a good uſe of land, or not; and when, and where ſuch a uſe ſhall be raiſed, altered or created; or not.

Firſt, in reſpect of the manner of raiſing it, and the ſeveral ways whereby uſes may be raiſed.

" could never be intended for his benefit."—*Hardr.* 494.—*Burgeſs* and *Wheate*, in Chancery *Hil.* 32 *Geo.* 2.——To this may be added, that it is ſaid to be a general rule, that any legal conveyance or aſſurance by a *ceſtuy que truſt* ſhall have the ſame effect and operation on the *truſt* eſtate, as it ſhould have had upon the eſtate *at law* in caſe the truſtees had executed the truſt (2 *Ch. Ca.* 78.)—And therefore a fine or recovery levied or ſuffered by a *ceſtuy que truſt* of an eſtate-tail, ſhall have the ſame effect in barring the iſſue in tail and remainders, as if the *ceſtuy que truſt* had been actually ſeiſed of the *legal* eſtate—*Ch. Ca.* 49.—1 *Pr. Wms.* 91.

(1) Six *Lunar* months—ſee before, *p.* 231.

Plow.

Plow. 22. ſeems to oppugn this (1). And if a man make a feoffment, levy a fine, or ſuffer a recovery, to the uſe of his laſt will, or to the intent to perform his laſt will, or to the uſe of ſuch perſon and perſons, and of ſuch eſtate and eſtates as he ſhall limit by his laſt will, and then afterwards by his laſt will declare the uſes; theſe are good uſes, and this is a good way of raiſing of uſes. So if a man deviſe his land by will to *I. S.* and his heirs to the uſe of *I. D.* and heirs; it ſeems that the uſe will riſe to *I. D.* and his heirs by this means. And if a man by a verbal agreement, in conſideration of money or the like, ſell his land to another, or agree and promiſe that the bargainee ſhall have it for any time, howſoever that hereby no uſe nor eſtate will ariſe (if it be a freehold that is ſold) within the ſtatute, becauſe it is not by deed indented, *&c.* yet it ſeems a good uſe will ariſe at the common law, and that the bargainee ſhall have relief in equity for his purchaſe. The ſecond thing whereunto reſpect muſt be had, is to the perſon intruſted, or to him to whom the conveyance is made: for to every good uſe there muſt be a perſon ſeiſed to uſe, and he muſt be a perſon capable of ſuch a ſeiſin. And for this it muſt be known that any ſole perſon that may take an eſtate to himſelf may make an eſtate to other uſes. Alſo a man may be ſeiſed of his own land to other uſes, as in the caſe of a covenant to ſtand ſeiſed to uſes. But the King, or any body corporate (2), alien born, or perſon attaint, cannot be ſeiſed to other uſes no more by an original feoffment to uſe, than when they come by the land in uſe at the ſecond hand; in which caſe, (as hath been ſhewed) neither ſuch perſons, nor diſſeiſors, abators or intruders, or Lords of villians, or by eſcheats, ſhall be ſeiſed to other * uſes; but in all theſe caſes the uſes are void, and the parties ſhall hold the land to their own uſes, or to the uſes of the feoffors, *&c.* and not to the uſe of *ceſtuy que uſe*. And a bargainee of land for valuable conſideration cannot be ſeiſed of the land to any other uſe but his own (3). The third thing to be reſpected is the *ceſtuy que uſe*; for to every good uſe, as there muſt be a perſon ſeized to uſe, ſo there muſt be a perſon to whoſe uſe he is ſeiſed, and he muſt be capable alſo. And for this it muſt be obſerved that any man that is capable of an eſtate directly and immediately to himſelf, is capable of the ſame eſtate by way of uſe: but if the uſe be limited to a corporation, there muſt be a licence had; otherwiſe it will be an alienation in mortmain. And if future uſes upon contingences be limited to ſuch perſons as are not in being, theſe uſes howſoever they are good at the common law, yet they are not good within the ſtatute; neither doth the ſtatute execute them at all, until they come in poſſeſſion. And if a feoffment be made to *I. S.* and his heirs to the uſe of the pariſhioners of *Dale*; this uſe is void, for they are incapable by this name; and it ſhall be to the uſe of the feoffor. The fourth thing to be regarded, is the eſtate of him that doth raiſe the uſe in the land whereof the uſe is raiſed; for howſoever the tenant in fee-ſimple of land may create what uſes he will in fee, for life, or years upon

Lit. ſect. 462, 463. Co. 17.

See the Stat. 27 H. 8. of Uſes. Fitz. Deviſe. 22. Dier 229.

Conſcience.

Co. 1. 122. 127. 135. Plow. 238. Dier 8. 283.

Secondly, in reſpect of the perſons truſted, and what perſons may not be ſeiſed to the uſe of another, but to their own uſe.

Reſolved in Doctor Atkin's caſe caſe 44. Q. Co. B.

* P. 509.

Dier 155. Lit. ſect. 60.

Thirdly, in reſpect of the perſons for whom the truſt is, or the *ceſtuy que uſe*.

Bro. Mortmain 37.

See before.

12 H. 7. 27. 49 Ed. 3. 4.

Fourthly, in reſpect of the eſtate and poſſeſſion of him that doth create the uſe.

(1) See the ſtatute 29 *Car.* 2. *c.* 3. which makes a writing neceſſary.

(2) The reaſon why neither the King nor a corporation can be ſeiſed to uſes, is becauſe an attachment does not lie againſt them out of chancery: ſee *Plow.* 555.—*Jenk. Cent.* 5. *caſe* 1.—*Co. Lit.* 19. b. 13th edit. and *note* 3 thereunto.

(3) See more amply what perſons may be ſeiſed to an uſe, in *Bac. Abr.* Uſes (E. 1.)—*Vin. Abr.* Uſes (C.)

it; and ſuch uſes are good; and the tenant in tail, or for life may perhaps grant their land for their own lives to the uſe of a third perſon; yet if a tenant in tail for good conſiderations covenant to ſtand ſeiſed to the uſe of himſelf for life, and after of his eldeſt ſon in tail; no uſe will riſe by this covenant. So if tenant in tail of an advowſon in groſs grant it by deed to one and his heirs to the uſe of himſelf for life, and after to the uſe of another in fee; this grant is void by the death of the tenant in tail. And if ſuch a tenant in tail bargain and ſell his land by deed indented and inrolled; hereby the bargainee hath an eſtate deſcendible to his heirs, but determinable upon the death of the tenant in tail. And if one covenant by indenture to ſtand ſeiſed to the uſe of *B.* of *White-acre* which he hath not then, but he doth afterwards purchaſe it; by this no uſe will riſe. And if one that hath but a term of years grant it to *I. S.* to the uſe of himſelf for life, *&c.* this is no good uſe within the ſtatute, but a chancery truſt only. The fifth thing to be reſpected, is the eſtate of him that doth take by the conveyance out of which the uſes are derived: for howſoever where a man doth grant a fee-ſimple to another and his heirs, he may limit what uſes he will upon this eſtate; and if a man make an eſtate for life to another, he may limit an uſe thereupon; yet if a man make a gift in tail to another, he can limit no uſe thereupon. And therefore if one grant his land to *I. S.* * and the heirs of his body, to the uſe of *I. S.* and his heirs in fee, this limitation of uſe is void, and *I. S.* hath hereby an eſtate in tail. And if a feoffment be made to *I. S.* to have and to hold unto him and the heirs of his body, to the uſe of him his heirs and aſſigns for ever; this uſe is void. And where one doth bargain and ſell land for money, (in which caſe the law doth make an expreſs uſe,) no other uſe can be appointed. And therefore if *A.* for money bargain and ſell land to *B.* and his heirs, to the uſe of *A.* for life, and after of *B.* in tail, and after of *A.* in fee; all theſe uſes are void, for a uſe cannot riſe out of a uſe. So if *A.* make a leaſe to *B.* for years rendering rent, to have and to hold to the uſe of the leſſor; this uſe is void as being againſt reaſon alſo. And if a feoffee to uſe, before the ſtatute of uſes, had bargained and ſold the land to one who had notice of the former uſe, no uſe had been made hereby: for there might not be two uſes in being of the ſame land at one time. And if *A.* enfeoff *B.* to the uſe of *C.* and his heirs, with proviſo that if *D.* pay to *C.* one hundred pounds, that *C.* and his heirs ſhall ſtand ſeiſed to the uſe of *D.* and his heirs, this laſt uſe is void; for the uſe muſt ariſe out the eſtate of the feoffee, and not out of the eſtate of the *ceſtuy que uſe*. The ſixth thing whereunto reſpect muſt be had, is the cauſe or conſideration: For howſoever in caſes where uſes paſs by way of tranſmutation of poſſeſſion, as by fine, feoffment, or recovery, there the conſideration is not at all material; for he that doth make the eſtate, may appoint the uſe to whom he will without any reſpect to marriage, kindred, money or other thing; for in this caſe his own will and conſideration guideth the uſe and equity of the eſtate; yet in bargains and ſales, and covenants to ſtand ſeized to uſes, it is otherwiſe: for there conſideration is ſo neceſſary that nothing will paſs, neither will any uſe riſe without a conſideration, *i. e.* ſome matter that may be a cauſe

Hil. 38. Eliz. C. B. Curia. Co. 2. 52. Paſche 13. Jac. C. B. Seignor Say verſus Smith.

Co. 10. 96.

Yelverton's caſe 37. Q. B. R.

Dier 369.

Co. 2. 78.

Co. ſuper Lit. 19.

Trin. 14. Jac. B. R. Adjudged Couper and Franklin's caſe.

Dier 169. Cromp. Jur. 53. Lit. Sect. 284.

Dier 255. Co. 1. 136. 137.

Co. 1. 176.

Dier 169. Cromp. Jur. 62.

Fifthly, in reſpect of the eſtate and poſſeſſion of him that doth take by the conveyance.

* P. 510.

Sixthly, in reſpect of the cauſe or conſideration of it; and what ſhall be a ſufficient conſideration to raiſe or alter a uſe, or not.

or occasion meritorious, which amounteth to a mutual recompence in deed or in law; which must be expressed or implied in the deed whereby the use is created, or else supplied by averment and proof (1). For howsoever in this case an averment shall not be allowed and taken against a deed, that there was no consideration given, when there is an express consideration upon the deed; yet when the deed expresseth no consideration, or saith [for divers good considerations] or the like, there an averment of a good consideration given shall be received; for this is an averment that may stand with the deed; and without consideration inrolment will not help. And therefore if one bargain and sell his land to another by deed indented and inrolled without any consideration, it seems no use will rise by this to the bargainee. So if one [for divers good causes and considerations, or for divers great and valuable considerations] bargain and sell his land to another, or covenant to stand seized of his land to the use of another that is not of * his kindred; no use will rise by this, unless it be proved that money or something else was given for it. But if a man by deed in consideration of money, [as, in consideration of the sum of one hundred pounds to him paid, or in consideration of a competent sum of money to him paid, or otherwise promised to be paid, or in consideration of other land, or of giving of counsel, or the like] bargain and sell, or by such like words grant his land to another in fee-simple, fee-tail, for life, or years; in these cases, the use will arise to the bargainee well enough. And therefore if I covenant with *B.* that when he doth enfeoff me of *White-acre*, I will stand seized of *Black-acre* to the use of him and his heirs, and he doth enfeoff me accordingly; in this case, the use of *Black-acre* will rise to *B.* and he and his heirs shall have it according to the agreement. So if I agree with my lessee for years, that if he pay me one hundred pounds, within his term, that I will stand seized of the land to the use of him and his heirs, and he do pay me the one hundred pounds accordingly; in this case, the use will rise, and he and his heirs shall have it according to the agreement. So if I covenant that my son shall marry the daughter of *A.* and *A.* promise to give me a hundred pounds for the marriage portion, and I covenant that if the same marriage do not take effect, I and my heirs will stand seized of the land to the use of *A.* and his heirs until the one hundred pounds be paid; in this case, a good use will rise of the land accordingly, if the marriage do not take effect: but in all these and such like cases the covenant must be by deed indented, and it must be inrolled; otherwise no uses will arise. And when the deed is inrolled, it shall take effect as from the beginning by relation, to avoid all intervenient estates and charges whatsoever. And in like manner it is if one for no cause, or for no consideration, [as, because he is of his ancient acquaintance; or because there hath been intire love or great familiarity between them; or because he hath been his chamber-fellow, school-fellow, or fellow-servant; or because he hath done him good service; or because he was his master and taught him; or to the end that he may pay his debts and legacies and discharge his funerals; or for

Averment. Dier 146. Co. 1. 196. 11. 25. Dier 312.

* P. 511.

Plow. 302. Bro. Fait. Inrol. 9. Doct. & St. 99. Cromp. Jur. 60, 61. Dier 90.

Cromp. Jur. 61.

Bro. Exposition of words 44.

Relation. Plow. 302. 21 H. 7. 20.

(1) See further as to the consideration necessary to create a use, in 2 *Bl. Com.* 330.—*Gilb.* 84.—*Bacon's Tracts* 151. *ante* 161.—*Bac. Abr.* Uses, &c. (E. 2.)

divers

divers good cauſes and conſiderations;] if one, for any of theſe or any ſuch like cauſes and conſiderations, covenant with another that he will ſtand ſeized of his land to the uſe of that other and his heirs, or that he and his heirs ſhall have the land, &c. by this covenant, whether it be inrolled or not, no uſe at all will riſe. So if one covenant to ſtand ſeized to
Dier 374. the uſe of *I. S.* (who is his baſtard ſon) and his heirs; no uſe will ariſe hereby: and yet perhaps upon ſuch a covenant as this, whereupon no uſe nor eſtate doth ariſe, an action of Covenant.
Co. 7. 11. 10. 143. 1. 83. Plow. 301. Lit. ſect. 284. covenant may lie. But if one [in conſideration of nature, kindred, blood, or marriage, with ones ſelf, or any of his blood, payment of debts, or for the like cauſe] or without any ſuch expreſs conſideration at all, *covenant to ſtand ſeized * P. 512.
Co. 1. 154. to the uſe of himſelf, his wife, children, brothers, ſiſters, or couſins, or their wives; theſe are good conſiderations, and the uſes and eſtates thereupon thus raiſed and made, are good: and therefore if one covenant by his deed, without expreſſion of any conſideration, to ſtand ſeized of his land to the uſe of himſelf for life, and after of his wife for life, and after of his child in tail, or for life, and after of his brother in tail, or for life, or in fee, or in any ſuch like manner; theſe uſes will riſe, and the eſtates will be well made hereby accordingly. So if I agree with another, that
Plow. 301. Bro. Feoffment al. uſes 54. if he marry my daughter, from the time of the marriage they ſhall have my land to them and their heirs; in this caſe and by this agreement, if he do marry my daughter, they will have my land according to the agreement: ſo if I, being about to marry with a woman, covenant with *I. S.* to ſtand ſeized of my land to the uſe of myſelf for life, and after to the uſe of the woman I am to marry for her life, and after to the uſe of the heirs of my body begotten on her; theſe are good uſes and eſtates that are made by
Curia Trin. 10 Car. B. R. Hoſkin's caſe. this covenant: but here, by the way, this difference muſt be obſerved, where a man doth covenant, in conſideration of a marriage to be had, to ſtand ſeiſed to an uſe, and the marriage doth not take effect, there no uſe ſhall ariſe: ſo alſo if the parties diſagree at their age of conſent: and ſo was it held in the lord *Herbert's* caſe: but where one doth covenant to make a feoffment, or levy a fine to ſuch uſes, and the feoffment is made, or fine levied accordingly, there notwithſtanding the marriage doth not take effect, yet the uſe ſhall ariſe: for there he is in by the fine or feoffment, in which caſe there needs no conſideration. And therefore if *A.* covenant with *B.* that in conſideration *C.* is his kinſman, and in conſideration of a marriage to be had between *C.* and *E.* he will make a feoffment and other aſſurances to the uſe of himſelf for life, the remainder to *C.* and *E.* and the heirs of their two bodies, and after aſſurances are made accordingly by fine or feoffment, but they do not intermarry, but marry others; in this caſe notwithſtanding, *E.* ſhall
Co. 7. 40. 11. 84 Dier 374. have a moiety of the land. So if I covenant (in conſideration of the love I bear to my wife) to ſtand ſeized to the uſe of her and the heirs of my body upon her begotten, and after to the uſe of my brother; hereby the uſe will riſe to my brother alſo, albeit he be not within the expreſs conſideration. So if one covenant with his two ſons, for the love he doth bear to them, to ſtand ſeized of his land to the uſe of himſelf for life

life, and after of his wife for life, and after of his two ſons in tail one after another; in this caſe, the conſideration is ſufficient to raiſe the uſe to the huſband and wife alſo. So if one (in conſideration of the love he doth bear to his brother) doth covenant to ſtand * ſeized to the uſe of his brother, and the wife of his brother for life, or in tail; in this caſe, the conſideration is ſufficient to raiſe the uſes to them both. So if I covenant (in conſideration of the marriage of my ſon with the daughter of another) to ſtand ſeized to the uſe of myſelf for life, and after of my ſon and his wife, in tail; theſe are good uſes and will riſe accordingly. If I covenant with *I. S.* to ſtand ſeized to the uſe of him, his executors, *&c.* (he being none of my kindred) for twenty years, and after to the uſe of my ſon in tail; in this caſe, the uſe will not riſe to *I. S.* but it will riſe to my ſon well enough. For albeit the conſideration of money given by one, may be a conſideration to all the eſtates; yet the conſideration of blood, *&c.* is ſingular, and will raiſe the uſe of that only to which it goeth: but if I covenant with *B.* in conſideration of the marriage of my ſon with the daughter of *B.* to ſtand ſeized to the uſe of *R.* (a ſtranger) for life, and after to the uſe of my ſon and his wife in tail; in this caſe, the uſe ſhall riſe to *R.* albeit he be a ſtranger, and that for the ſupportance of the remainder, which cannot be without a particular eſtate: and in all theſe and ſuch like caſes, no inrollment of the deed is neceſſary. If I (in conſideration of ten pounds given to me by my ſon) covenant with him to ſtand ſeized of land to the uſe of him and his heirs; in this caſe, no uſe will riſe without inrolment by the implied conſideration, becauſe there is an expreſs conſideration, *et expreſſum facit ceſſare tacitum.* And yet if I covenant, in conſideration that *I. S.* is my ſon and hath paid me ten pounds, that I will ſtand ſeized of land to the uſe of him and his heirs; in this caſe, the uſe will ariſe without inrolment. And if I covenant in conſideration of one hundred pounds, and of a marriage, to ſtand ſeized to the uſe of myſelf for life, and after of my ſon in tail; hereby the uſe is raiſed, and the poſſeſſion charged without inrolment. So alſo where a feoffment is made, fine levied, or recovery ſuffered, and no uſe declared thereupon; and the ſame is without any conſideration of fine or rent; by this the uſe is not changed, for it doth reſult to the feoffor, conuſor, or recoveree, and he hath the eſtate as he had it before: but if, in theſe and ſuch like caſes, there be but a penny or a penny-worth of conſideration given, or any rent reſerved upon the feoffment, the uſe will riſe well enough to the feoffee, *&c.* and if any tenure be created, as where a gift in tail, leaſe for life, or years, is made; in theſe caſes, albeit there be no conſideration given, yet the uſe will riſe well enough to the donee or leſſee, and eſpecially, if any rent be reſerved, for that is a kind of conſideration: but if a leſſee for years grant over his term to another without any conſideration at all, it ſeems by this no uſe at all will riſe to the grantee, and therefore the grantee ſhall hold it to * the uſe of the grantor; *ſed quære.* The ſeventh thing whereunto reſpect is to be had, is the manner and form of words uſed in the making and raiſing of uſes, wherein there is much regard to the mind and intention of parties: for if

* P. 513.

Inrolment.

Plow. 307.

Plow. 307. Dier 174.

Co. 12. 24. 25. 7. 40.

Manrel's caſe Trin. 3 Jac. B. R. Bro. Feoffmental. uſe 15.

Co. 1. 24. Doct. & S. 97. 99. 101.

* P. 514.

Seventhly, in reſpect of the manner and frame of the words uſed in the raiſing of uſes; and what manner of uſes may be made, or not.

Co. 8. 94. if one covenant in consideration of twenty pounds paid him by *I. S.* to stand seized of land to the use of *I. S.* and his heirs; or if one covenant that *I. S.* and his heirs shall have his land; if this deed be inrolled, this is a good bargain and sale to raise the use, and will do it as well as when it is made by the words [*bargain and sell*]. So if one, for good consideration, by words of demise and grant, make a lease of his land for a term of years; hereby the use will rise to the lessee, as well as if the lease were made by the words, *bargain and sell: et sic de similibus.* And yet if one, by words of *bargain and sell*, convey his land to his son; no use will arise by this, except there be money paid, and the deed be inrolled. And if one, in consideration of money, grant his land to his son, or any other, by the word [*enfeoff*]; no use will rise by this, unless livery of seisin be made thereupon; because the intent of the party in these cases doth appear to be to pass it in another manner: and if in the last case livery of seisin be made, then the use shall be guided by law; that is, if nothing be given, it shall be to the use of the feoffor, and not amount to a limitation of use to the son. If one covenant with his son, that his land shall remain, or that his land shall descend to him; this is a good covenant to raise the use according to the limitation. And yet if one covenant with his son upon his marriage, that his land shall remain, revert, or descend to his son in fee, or in fee-tail; by this no use will be raised, because it is so incertain; but perhaps this may amount to a covenant, whereupon the son may have an action of covenant (1). If I covenant for me and my heirs, that I and my heirs, and all others that are seized of my lands, shall be thereof seized to the use of &c. this is a good covenant to raise the use, albeit it be in words of the future tense. If I covenant with my eldest son, and strangers, to convey my land to the same strangers to the use of myself for life, and after of my son in tail, &c. and I grant by the deed, that the said persons seized of the said land, shall be from thence seized to the said uses, and none other use, and no other conveyance is made; it seems this is sufficient to raise the use: and yet if I be seized of land in fee, and covenant with *I. S.* that *A. B.* and *C. D.* and their heirs, shall stand and be seized of this land to the use of &c. it seems, this is not a good covenant to raise the uses.

Resolved in Stiles case 37 Eliz.

21 H. 7. 18. Plow. 308. 301. Bro. feoffment all use. 16.

Co. 4. in Sir Rowland Hayward's case. Warde versus Lambert. C. B. Pasch. 37 E.

Inrolment.

Covenant.

Dier 374.

Co. 1. 120. If a feoffment or other conveyance be made to the use of the feoffor and the heirs of his body, begotten on the body of *M.* the wife of *S. T.* and for default of such issue, to the use of him and the heirs of his body, begotten of *S.* the now wife of *W. K.* and for default of such issue, then to the use and performance of * his last will, for ten years immediately after his death, and after the term ended, to the use of the feoffees and their heirs during the life of *W.* (eldest son of the feoffor) and after his death to the use of the first issue male of the body of the feoffor lawfully begotten, and the heirs of

* P. 515.

(1) If I covenant that my son shall have my land, this was held good by reason of the word *covenant*, in 1 *Co. Chudleigh's* case, and was cited out of *Seymour's* case, in *Dyer* 96.—But *Hobart* Chief Justice, (in *Buckley* v. *Simmonds*, *Winch.* 61.) denied this; and *Bridgman* Chief Justice agreed with *Hobart's* opinion, that it wanted consideration. But, *per Bridgeman*, if I will that my son shall have my land in consideration of marriage, tho' the word covenant is wanting, yet the use is well raised. *Sid.* 26.

the body of such first issue male, and for default of such first issue male to the second issue male, &c. [in the same manner;] these are good limitations of uses. So if a use Co. 1. 46. b.
be limited to *I. S.* for life without impeachment of waste, and after to the use of *B.* and *C.* their executors and administrators for the term of twenty years, and after to the use of *C.* and the heirs male of his body, &c. these are good uses. So if a use be limited after this manner, *viz.* to the use of a Co. 6. 18. 1 Jo. Sect. 482. 468.
man's last will and testament, or to the use of such person or persons and of such estate and estates as he shall limit and appoint by his last will and testament; or to the use of such person and persons, or to such uses and purposes as he shall by any writing under his hand and seal declare and appoint; these are good limitations. If I covenant with another, in Co. 1. 176.
consideration of blood, &c. that I will stand seized of my land to the use of such of my sons, or such of my cousins, as the covenantee shall name; in this case, after a nomination made, the use will rise well enough. But if I (for and in consideration
Incertainty. of ten pounds or the like good consideration) covenant to stand seized of land to the use of such persons as the covenantee shall name; in this case, albeit the covenantee do nominate some of my cousins, or blood, yet no use will rise by this for the incertainty of it. If a feoffment or other conveyance be to the use of *I. S.* and his heirs, provided that if the feoffor pay ten pounds at such a day, that then it shall be to the use of the feoffor and his heirs; this is a good limitation, and the use will rise accordingly. A use may be limited to a woman *durante viduitate sua*, and this is Co. 4. 3.
good.

If a man be seized of two manors, and covenants to stand Co. 11. 25
seized of the same to the uses following, *viz.* of the one to the use of the covenantor for his life, and after to the use of his wife for life, and after to the use of his eldest son in tail, &c. and of the other manor, to the use of his second son in tail, &c. these are good limitations, and the uses will rise accordingly.

If a man seized of land in fee, agree with another, that Co. 2. 69. 70.
a fine shall be levied of it, and that the same shall be to the uses following, *viz.* that *I. S.* (the conusor) shall have one yearly rent of fifty pounds during his life to be issuing out of the same land, and as touching the land charged with the rent, &c. to the use of *I. D.* (the conusee) until default of payment of the said yearly rent, and then to the use of *I. S.* and his heirs for ever; this is a good limitation and the use will rise accordingly; *et sic de similibus.*

If a feoffment be made by *I. S.* to the uses in certain Co. 10. 78;
* P. 516. indentures * tripartite of the same date, and therein is declared that it shall be to the use of *A.* for life without impeachment of waste, and after to the use of such farmers, or tenants, to whom he shall demise any part of the premisses for life, or lives, or for any term of years, as in any such demise shall be limited and appointed, and after to the use of the performance of the last will of the said *A.* and to the use of such person or persons severally to whom the said *A.* by his last will and testament shall appoint any estate, and after to the use

uſe of, &c. theſe are good uſes, and the eſtates ſhall riſe accordingly.

Co. 4. 23. A uſe may be limited upon condition, and the condition may be annexed to one of the uſes, and not unto another.

Co. ſuper Lit. 19. If lands be conveyed to *I. S.* and the heirs of his body, to the uſe of *I. S.* and his heirs, or to the uſe of a ſtranger and his heirs; this uſe will not riſe in this manner (1). yet if lands be conveyed to *I. S.* and his heirs, to the uſe of him and the heirs male of his body and after to the uſe of a ſtranger and his heirs; it ſeems this is a good limitation.

Hil. 6 Car. B. R. Adjudged. If one grant lands by deed to huſband and wife, to have and to hold to the uſe of the huſband and wife and of the heirs of their two bodies; this is a good eſtate tail by this limitation, albeit he do not ſay *habendum* to them and their heirs, *&c.* but *habendum* to their uſes; but otherwiſe it were if the uſe were limited to a ſtranger in this manner.

Dier 314. If lands be conveyed by *I. S.* to *I. D.* to the uſe of *I. S.* or to the uſe of his wife for life, or to the uſe of another for life, the remainder to another in tail or for life, the remainder to a third, his executors, *&c.* for ſix months, and after the ſix months ended, to the uſe of a fourth and his heirs; theſe are good limitations, and the eſtates will riſe accordingly.

Dier 290. If a uſe be limited to the conuſee of a fine, or to a recoverer in a recovery, until he make a leaſe for forty years, and after to the uſe of the recoverees or conuſors and their heirs; this is a good limitation, and the uſe will riſe accordingly (2).

Co. 1 in Chulleigh's caſe 135. Contingent uſes, or uſes in *poſſe*, may be created as well as uſes in *eſſe*; and therefore if lands be conveyed to the uſe of a man and the wife he ſhall afterwards marry, or to the uſe of his firſt, ſecond, or third wife; or to the uſe of *I. S.* for life, and after to the uſe of the right heirs of *I. D.* and *I. D.* is then living; or to the uſe of *I. S.* for life, and after to the uſe of him that ſhall be his firſt heir male, and the heirs of the body of ſuch heir male, *&c.* all theſe, and ſuch like, are good uſes; but they are uſes at the common law ſtill, and are not executed by the ſtatute until they come in *eſſe*. The laſt thing whereunto reſpect is to be had, is the nature and quality of the uſe: and herein it is to be known, that a man may * at this day by act executed in his life time, or by his laſt will and teſtament at his death, give his lands, tenements or hereditaments, to any perſon or perſons not corporate, and their heirs, for any religious, charitable, or civil uſe, as well as for any private uſe; and therefore a man may ſo diſpoſe of his lands for the finding of a preacher, erecting or maintainance of a ſchool, relief and comfort of maimed ſoldiers, ſuſtenance of poor people, reparations of churches, high-ways, bridges, diſcharging of the poor inhabitants of a village of the common charges, to make a ſtock for poor la-

Eighthly, in reſpect of the nature and quality of the uſe.

* P. 517.

Co. 1. 26. 8. 131. 4. 213. Charitable uſes.

bourers

(1) A tenant in tail cannot be ſeized to any uſe expreſſed; for the St. of *Weſtm. 2. ch. 1. de donis* has ſo appropriated and fixed the eſtate tail that neither the donee nor his iſſue can execute this uſe.—*Jenk. Cent.* 5. caſe 1.

(2) See further by what words uſes may be created, in *Vin. Abr.* uſes. (E. 4.)—*Gilb.* on Uſes 60.

bourers in husbandry, and poor apprentices, and for the marriage of poor virgins, or other such like uses, and these uses are not prohibited by any statute: and it is good policy, upon every such feoffment or estate to reserve to the feoffor and his heirs some small rent, or to set down some small consideration: but these uses are not such uses as are executed by the statute of uses, neither are they to be resembled to the uses aforesaid; for in this case, if there be any mis-imployment of the lands, or breach of the trust by the parties trusted, redress is to be had of the lord chancellor or lord keeper by a special course of proceeding. For which, see the statutes of 39 *Eliz. c.* 6. 43 *Eliz. c.* 9. 7 *Jac. c.* 3. (1). But if any man have heretofore given, or hereafter shall give, any lands, tenements or hereditaments, by act executed in his life, or by his last will at his death, to any person singular or corporate, in fee-simple, fee-tail, for life, or years, to the intent or upon condition to maintain any superstituous use, as to find a chaplain, and have the service of a priest to say mass, or to have a priest or other man to pray for the soul of any dead man in such a church or other place; or to have or maintain perpetual obites, lamps, or torches, *&c.* to be used at certain times, to help to save souls out of the supposed purgatory; all these and such like uses are void; and the lands that are so given to such superstituous uses are to be forfeited, and given to the king, and he shall have them; and yet if there be any charitable use intermixed with the superstitious use, and they may be distinguished, the king shall have only so much as is given to the superstitious use, and not that which is given to the charitable use also: for which, see *Adams* and *Lambert's* case at large, *Co.* 4. 104. (2).

Superstitious uses.

Stat. 15 R. 3. c. 5. 37 H. 8. c. 4. 1 Ed. 6. c. 14.

5. Declaration of uses; and where a use of land may be declared upon any assurance, and what shall be a sufficient declaration of such use, or not.

As touching the declaration of uses, *i.e.* the manifestation or agreement of the parties, to what uses and intents the assurance made shall be, these things are to be known: 1. that uses may be declared or averred on a fine, feoffment, or recovery of land; but on a bargain and sale of land, no use may be declared or averred, but what the law doth make. And upon a covenant of uses, no other use may be declared or averred, but what is contained * within the deed. 2. Every one may declare and dispose the use of land according to the estate that he hath in the land; for the declaration and disposition of the use doth ensue the ownership of the land, *sicut umbra sequitur corpus*. And at this day the use doth draw the land to it, as the body or principal doth, the shadow or accessary: and therefore the owner of the land, or he from whom the land doth move, ought to limit and declare the use of the land; as if the husband and wife levy a fine of the land, whereof he is seised in the right of his wife; the husband alone may declare the use of this fine, and this declaration shall bind the wife, albeit her assent to the limitation of the uses do not appear, if her dissent doth not appear; but in this case, it is most proper to have a declaration of the uses by the husband and wife both; for she alone, because she is *sub potestate viri*, cannot declare or limit any use; neither can the husband alone limit

Co. 1. 175. 176. Dier 169.

* P. 518.

Co. 2. 57. Dier 290.

(1) See fully what devises for charitable purposes are good, in *Duke's* law of charitable Uses, 105, *&c.* and what shall be a good appointment to a charitable use, in *Com. Dig.* Uses. (N. 11.)—Chancery (2 N. 2.)

(2) See further what uses are suppressed as superstitious, in *Com. Dig.* Uses. (M).

any uſe againſt her good will, becauſe he hath not the eſtate of the land: and therefore, if *A.* and *B.* his wife be ſeized of land in the right of his wife, and ſhe, without the conſent of her huſband, covenant by indenture with *C.* and *D.* 14 *Martii*, 14 *Eliz.* that a fine ſhall be levied of this land, and that it ſhall be to the uſe of herſelf for life without impeachment of waſte, and after to the conuſees for their lives, to the intent that they ſhall ſuffer *I. S.* to take the profits for his life, with divers remainders over; and afterwards, and before the fine levied, the huſband alone by another indenture 21 *February* 22 *Eliz.* (wherein the wife is named a party) without the conſent of his wife, doth agree that a fine ſhall be levied to the uſe of him and his wife, and after to the uſes limited by the wife's indenture, and after the fine is levied accordingly; in this caſe, albeit the variance be in one particular only, and the limitations in all the reſt of the uſes and eſtates do agree, yet all the ſame limitations by both indentures are void, and the uſe upon the conveyance is left to conſtruction of law, and therefore ſhall be to the wife and her heirs for ever: and yet if the huſband and wife agree in the limitation of the uſes for part of the land, and differ in the reſt, the limitations for ſo much as they agree in are good, and void for the reſidue: and in theſe caſes, where the declaration is good, the wife and her heirs ſhall be bound by it. So if two joint-tenants are, and they, or two others having ſeveral eſtates, join in a fine, and one of them declare the uſe in one manner, and the other doth declare the uſe in another manner; this declaration is good for either of their parts; for the declaration ſhall be governed according to their eſtates. And if an infant, or a man *non ſanæ memoriæ*, doth declare the uſe of a fine levied by him, this declaration is good, and ſhall bind him ſo long as the fine ſhall continue in his force (1). 3. This declaration of uſes may be made
Co. 2. 73 5. * either by deed indented, (which is the moſt uſual and ſafe way,) or by deed poll; as where the parties do by ſuch a writing agree that an aſſurance paſſed, or to be paſſed, ſhall be to ſuch and ſuch uſes; as that a fine ſhall be levied by ſuch a time, and that it ſhall be to the uſe of one for life, of another in tail, and of another in fee. Or it may be made by a verbal agreement without any writing at all; as where an agreement is ſo had, and made between two or more, that a fine or recovery ſhall be had, and ſhall be to ſuch and ſuch uſes, and the ſame is had accordingly; in this caſe, this is a ſufficient declaration, being proved; but it is not ſafe in theſe caſes to depend upon
Co. 2. 69. 70 6 27. 63. Dier 290. Co. 7 40. Co. 9. 8. Dier 136. ſlippery memory (2). 4. This declaration by word or writing, may be made before, at, or after the time of making the aſſurance: and therefore one may covenant or agree that *I. S.* ſhall recover againſt him, or that he will levy a fine, or make

Huſband and wife.

Joint-tenants.

Infant.

* P. 519.

(1) See accordingly *Mansfield*'s caſe, 12 *Co.* 124.—*Pig. on Rec.* 72.—2 *And.* 163.

(2) But now by ſtatute 29 *Car.* 2. *c.* 3. All declarations or creations of truſt or confidences of any lands tenements or hereditaments ſhall be manifeſted and proved by ſome writing, ſigned by the party who is by law enabled to declare ſuch truſt, or elſe they ſhall be utterly void, and of no effect.—After the ſtatute of frauds it was doubted, whether it was not neceſſary to declare the uſes of fines or of common recoveries either at, or previous to, the time of levying or ſuffering thereof; and whether a ſubſequent declaration of the uſes would not have been void; and therefore the ſtatute 4 *Ann. c.* 16. § 15. enacts, that ſuch ſubſequent declarations of uſes ſhall be good and effectual.——Since the ſtatute of frauds, uſes may be declared by writing only without ſeal. per *Holt* Ch. J.—7 *Mod.* 76.

a feoffment to *J. S.* of ſuch land, and that the ſame ſhall be to the uſe of, *&c.* And if one make a feoffment, he may declare the uſes of it at the ſame time, and that within the ſame or in another deed at his pleaſure; and if the aſſurance be paſt, and no declaration of uſes had before, or at the time of paſſing it, a declaration may be ſubſequent, *viz.* that the ſame aſſurance was and ſhall be, and recoverors, *&c.* ſhall ſtand and be ſeiſed to ſuch and ſuch uſes; for an indenture ſubſequent may direct and declare the uſes of a fine or recovery precedent. But herein theſe diverſities are to be obſerved; when precedent indentures are made to direct the uſes of a ſubſequent aſſurance, and after the aſſurance is made accordingly, there no averment ſhall be taken by word, that the ſame aſſurance was to other uſes than are declared by the indenture; but againſt an indenture ſubſequent, declaring the uſes of an aſſurance precedent, an averment may be taken, that there were other uſes expreſſed and limited, before or at the time of the aſſurance, than are contained in the indenture. If a precedent indenture be made to direct the uſes of a ſubſequent aſſurance, when the aſſurance comes, the land is bound, and the conuſor or recoveree cannot by any act of his, after the recovery had, charge or avoid it; but if the declaration be ſubſequent, if in the interim, between the aſſurance had, and the declaration of the uſes, the conuſor or recoveree ſell, give, or charge the land to others; this ſubſequent declaration will not ſubvert the mean eſtates, charge or intereſts; unleſs it can be otherwiſe proved, that, by a certain and compleat agreement of the parties, the aſſurance was had and made to theſe uſes. 5. When the agreement for the limitation of uſes is precedent, whether it be by writing or word, it is but directory, and doth not bind the eſtate, until the ſame aſſurance be afterwards had; and therefore by a new agreement or declaration made in the ſame manner as the * former *viz.* in writing, if the former be ſo, and between the ſame parties, either before or at the time of the ſame aſſurance paſſed, new uſes may be made and the former uſes changed (1): but when the ſame aſſurance is purſued accordingly, and no intervenient alteration is made, it ſhall be expounded to be to the ſame uſes, and ſhall bind the parties; and no naked averment ſhall be received of any latter or other agreement contrary to the indentures. 6. The declaration of the uſes muſt be certain, and that eſpecially in three things; in the perſons to whom, in the lands, *&c.* of which, and in the eſtates by which, the uſes are declared (2); and if there want certainty in either of theſe, the declaration is not good; and it muſt be compleat of itſelf without any reference to indentures, or other writings to be made afterwards, for then it is but an imperfect communication, and no compleat declaration. 7. Where an indenture precedent is to limit the uſes of a ſubſequent fine or

Averment.

* P. 520.

(1) And the revocation of the former uſes will be good, though it be but by a writing and not by a deed; for where the conveyance enures by way of tranſmutation, the uſe is according to the intent of the party; and 'tis no matter how that intent is manifeſted, ſo as it may be known, *Jones* v. *Morley*, *Show. Parl. Ca.* 140.—S. C. 1 *Salk.* 677. and ſee the caſes in the margin of the laſt edition of that reporter.

(2) It is not neceſſary in declaring an uſe, if there be a tranſmutation of poſſeſſion, to uſe the very word *uſe*. Any expreſſion whereby the mind of the party may be known, that ſuch a one ſhall have the land, is ſufficient, *per Holt*, 12 *Mod.* 162.

recovery, and is not purſued in ſome circumſtance of time (1), perſon, quantity, or the like; yet if no other new mean agreement may be proved, the aſſurance ſhall be in judgment of law to the uſes contained in the ſame indenture; but if the variance be in theſe particulars, and the form of the indenture be not purſued, there an averment without writing may be taken, that the fine or other aſſurance was to other uſes than are contained in the indenture: and if none ſuch can be made, then it is left to conſtruction of law (2). And therefore if *A.* be ſeiſed of divers manors in fee, and by his indenture dated 10 *Martii*, 21 *Eliz.* doth covenant with *B.* and *C.* that he, before the end of Trinity term next, will by fine, or other conveyance, aſſure one of theſe manors to them, and that the ſame aſſurance ſhall be to the uſe of *A.* and *E.* his wife, and of the heirs of *A.* and the twenty-eighth day the deed is inrolled; and, the twenty-ninth day of the ſame month, he doth by another indenture covenant with the ſame *C.* and *D.* to convey all the ſame manors to the ſame *C.* and *D.* before the annunciation next, and that the ſame aſſurance ſhall be to the uſe of *A.* and the heirs male of his body, and for default of ſuch iſſue, to the uſe of divers others in remainder, and by this indenture doth covenant, that if he ſhall not ſufficiently convey this land by the day, that he will ſtand ſeiſed to the ſame uſes, *&c.* and no fine is levied by the end of Trinity term, but, the ſeventeenth of *September* following, a note of a fine is acknowledged to *B.* and *C.* and the heirs of *B.* of the land within the firſt indenture; and, the eighteenth of the ſame month, another note of a fine is acknowledged to *C.* and *D.* of the ſame and other land in the laſt indenture, and both theſe fines are entred in *Octabis Mich.* following; in this caſe, theſe fines cannot be directed and declared by both indentures, and therefore it ſeems the declarations are void (3).

Co. 9. 8. 5 20. 25. Doct. & St. 95. Co. 2. 57.

As touching averment of uſes; *i. e.* the proof of uſes by witneſſes, theſe things are to be known; that where any uſe is expreſſed upon a charter of feoffment, no other uſe *contra* or *preter* the uſe * which is expreſſed, ſhall be admitted. But in caſes of fines and recoveries wherein no uſes are expreſſed, other uſes than what law-conſtruction will make, may be ſhewed and proved to be agreed upon; and the ſame aſſurances ſhall be to ſuch uſes, as by proof ſhall be made to appear to be the intent of the parties: as if a man and his wife ſell her land for money, and after levy a fine to the vendee and his heirs; in this caſe, it may be averred it was for money; and this ſhall carry the uſe to the vendee without any declaration of uſe, which otherwiſe would reſult to the woman and her heirs: and yet if a fine be with a grant and

6. Averment of uſes; and where a uſe of land may be averred upon any aſſurance; and what ſhall be ſaid a ſufficient averment, or not.

* P. 521.

(1) Where there is an agreement to ſuffer a recovery, and uſes are declared, if the recovery is after ſuffered, though it varies in point of *time* from the recovery covenanted to be ſuffered, yet if there is no ſubſequent declaration of uſes, the recovery will enure to the uſes ſo declared; *per* Ld. *Hardwicke*. 1 *Atk* 7.

(2) Where the uſes of a recovery are declared by deed precedent, no new or other uſe can be averred by parol, unleſs there was ſome variance between the deed and the recovery; and in caſe of a deed precedent, if the party ſet up other uſes, he muſt confeſs and avoid: but where they are by deed ſubſequent, new or other uſes may be averred without ſhewing the deed, though there be no variance, *&c.* becauſe there was an intermediate time when there might be ſuch agreement made, and the uſes ariſe by the recovery according to that agreement; and if a deed ſubſequent be ſet up, the other may traverſe thoſe uſes. *Per Holt* Ch. J. in *Tregame* v. *Fletcher*, 1 *Salk* 677.

(3) See further as to the doctrine of declaring uſes, in the books referred to in the concluding notes to the chapters on fines and recoveries;—and in *Vin. Abr.* Uſes (T. 2), *&c.*

render,

render, no averment to prove it to be to other uſes than what are contained in the fine ſhall be received. And where the uſes of a conveyance be declared by indenture before or at the time of the ſame conveyance, no averment ſhall be received of any other uſes than what are contained in the indenture: but if the indenture of declaration be ſubſequent, there an averment lieth and ſhall be received, that there were other uſes agreed upon at or before the time of the conveyance made. Co. 9. 8.

And where an agreement is made to levy a fine, or ſuffer a recovery, before or at a time certain, and that it ſhall be of ſuch and ſuch lands, and to ſuch and ſuch perſons; and after it falleth out that the fine, or recovery, is not had by that time, or not of the ſame land, or not between the ſame perſons; in theſe caſes an averment may be had of other uſes and of another agreement (1). Co. 5. 26.

7. To what uſe an aſſurance of land ſhall be by conſtruction of law; and how the limitation of the uſes of land by a deed ſhall be conſtrued.

Where the uſes of an aſſurance are certainly agreed upon and declared between the parties thereunto, there regularly it ſhall be to ſuch uſes as are declared and agreed upon, and to none others. But if a conveyance be made of land by fine, feoffment, or recovery, and no uſes thereof declared and agreed upon, the law will limit and appoint the uſe according to equity and conſcience. And therefore if a man levy a fine, make a feoffment, or ſuffer a recovery of land without any conſideration; the law will adjudge the uſe to be in the feoffor, conuſor, or recoveree who doth part with the land: and ſo if a man make a feoffment to the intent to perform his laſt will, or to the uſe of his laſt will, or to ſuch perſons as he ſhall limit by his laſt will; in all theſe caſes, the uſe ſhall be in the feoffor and his heirs, while he doth live to diſpoſe at his pleaſure. And ſo if one make a feoffment of land to *I. S.* and his heirs, to the uſe of *W. S.* for twenty years, and limit the uſe no further; in this caſe, the reſidue of the uſe after the twenty years, ſhall be to the feoffor and his heirs: but if in theſe caſes there be any conſideration of money or the like, though never ſo little given, or any rent reſerved upon the feoffment, the law will adjudge the uſe in the feoffee, conuſee or recoveror: and yet in that caſe alſo, if other uſes be expreſſed upon the deed, it ſeems it ſhall go to the uſes expreſſed; as if *A.* for twenty pounds paid by * *B.* enfeoff *B.* and his heirs, to the uſe of *C.* and his heirs. If the huſband and wife levy a fine of the wife's land without conſideration and without any declaration of uſe, the law will adjudge this to be to the uſe of the wife and her heirs; but if they ſell her land for money, and after levy a fine thereof to the vendee; this ſhall be to the uſe of the vendee and his heirs. And if a man be ſeiſed of land of the part of his mother, and without any conſideration make a feoffment in fee of it; this ſhall be ſaid to be to his uſe in the ſame nature he had it before (2). So if two

Doct. & St. 95. Perk. ſect. 533. Co. 1. 24. Dier 18. Cromp. Jur. 62. Co. ſuper Lit. 271.

Baker's caſe. Co. B. Hil. 37 Eliz.

Doct. & St. 95.

Co. 2. 57. 5[2].

* P. 522.

(1) See further in what caſes averments may be made of uſes, in *Bac. Abr.* Uſes (E. 5.)—*Vin. Abr.* Uſes (O. 6.)

(2) The contrary is ſaid in *Hobart* 31.—but the caſe in *Hob.* is denied to be law (and conſequently the paſſage above ſupported) by Lord Chancellor *Macclesfield*, who ſays, that in the caſes of *Godbolt* v. *Freeſtone*, 3 *Lev.* 406. and in *Abbot* v. *Burton* in 1 *Salk.* 591, it was ſolemnly adjudged, that the uſe, whether expreſsly declared by the feoffor, or permitted to ariſe by implication, was the ſame thing, and would go to the mother's ſide.——But where a man ſo ſeiſed on the part of his mother, levies a fine *ſur done grant et render*, it operates as a feoffment and re-feoffment, and gives a new eſtate deſcendible to the heirs general.—*Price* v. *Langford*, 1 *Salk.* 337.

joint-tenants be of land, the one in fee-ſimple, and the other but for life, and they without any conſideration levy a fine of it, and make no declaration of uſes; the uſe ſhall be to them of the ſame eſtate as they had before in the land. So if *A.* tenant for life of land, and *B.* in reverſion or remainder, levy a fine of this land generally, this ſhall be to the uſe of *A.* for life, and to the uſe of *B.* in fee afterwards as it was before. So if *A.* be ſeiſed in fee of an acre of ground, and he and *B.* join together and levy a fine of it to another without any conſideration; this ſhall be to the uſe of *A.* and his heirs only.

Perk. ſect. 533. If one make a gift in tail, or leaſe for life, or years, albeit it be without any conſideration of fine, or rent, yet the law will adjudge the uſe in the donee, or leſſee and not in the donor or leſſor.

Plow. 539. Co. 1. 87. yet ſee Lit. Bro. 538. Crompt. Jur. 47. 27 H. 8. 6. Co. 1. 110. If one at this day by deed indented bargain and ſell his land to another for money, and doth limit no eſtate, but the deed is *Habendum* to him only, and not *Habendum* to him and his heirs, or to him and the heirs of his body, or to him for life; howſoever in this caſe, before the ſtatute of uſes was made, it was otherwiſe, yet now the common received opinion is, that by this there doth paſs only an eſtate for life, and not a fee-ſimple.

Co. ſuper Lit. 42. Dier 169. If a feoffment be made to *I. S.* and his heirs, to the uſe of *I. D.* without any more words; by this limitation *I. D.* hath only an eſtate for life: ſo if a feoffment be made to *I. S.* and his heirs, to the uſe of *I. D.* for ever, without ſaying [and his heirs;] hereby *I. D.* hath only an eſtate for life: and ſo of other uſes the conſtruction ſhall be according to the rules of law.

Paſche 3 Eliz. B. R. the Lord Mordant's caſe. If a uſe be limited to *I. S.* and his heirs until *A.* ſhall come from beyond the ſea, and attain his full age or die, in this caſe, if he come from beyond ſea, attain his full age, or die, the uſe ſhall ceaſe.

Hil. 17 Jac. B. R. Rigway's caſe. If one covenant to ſtand ſeiſed to the uſe of *A.* his eldeſt ſon and the heirs male of his body, and after to the uſe of *B.* his ſecond ſon in tail in the ſame manner, or according to the limitation to *A.* by this *B.* hath an eſtate tail to him and the heirs male of his body.

Co. ſuper Lit. 28. * If a feoffment in fee be made to the uſe of a man and his wife for their lives, and after to the uſe of their next iſſue male to be begotten, in tail, and after to the uſe of the huſband and wife, and of the heirs of their two bodies begotten (they having no iſſue male then;) by this the huſband and wife are tenants in ſpecial tail executed; and after they have iſſue male, they are tenants for life, the remainder to the ſon in tail, the remainder to them in ſpecial tail. * P. 523.

Dier 300. If one make a feoffment to the uſe of himſelf for life, and after his deceaſe to the uſe of *Alice* whom he doth intend to marry, until the iſſue he ſhall beget of her ſhall be of the age of twenty-one years, and after the iſſue cometh to that age, then to the uſe of the wife during her widowhood, and the huſband die without iſſue; by this the wife ſhall have an eſtate at leaſt during her widowhood.

If I covenant with *B.* in conſideration that he will marry my daughter, that from the time of the marriage I will ſtand ſeiſed to the uſe of myſelf for life, and after to the uſe of *C.* a ſtranger and the heirs male of his body, and after to the uſe of *B.* and my daughter and the heirs of their two bodies; in this caſe, albeit the uſe limited to *C.* the ſtranger be void, yet it

ſeems *B.* and my daughter ſhall not have the land till the death of *C.* without iſſue, but that my heirs ſhall have it till that time.

If I covenant with *B.* to ſtand ſeiſed to the uſe of myſelf for life, and after my death to the uſe of *C.* a ſtranger for the term of twenty years, and after the end of the term to the uſe of my ſon in tail; in this caſe, the uſe limited to *C.* is void, and my ſon after my death ſhall have the land: but if the words of the covenant be [and after the end of twenty years] inſtead of [and after the end of the term] my ſon ſhall not have the land until the twenty years be expired (1). See more in expoſition of deeds. *chap.* 5. Co. 1. 155.

8. Where and how uſes of land may be extinguiſhed and deſtroyed, or ſuſpended or not; and where the ancient uſes ſhall be revived by the entry of the feoffees, or not.

All ſuch uſes, as are not within, nor executed by the ſtatute of 27 *H.* 8. but remain at the common-law, may be deſtroyed, diſcontinued, or ſuſpended, as uſes before the ſtatute might have been. And therefore contingent uſes may be extinguiſhed or ſuſpended at this day. As if a man, ſeiſed of land in fee, have three ſons *A. B.* and *C.* and he make a feoffment of his land to divers feoffees, to the uſe of them and their heirs during the life of *A.* and after to the uſe of the firſt ſon that *A.* ſhall beget and the heirs male of the body of ſuch firſt ſon; or if a feoffment be made to the uſe of a man and the wife that he ſhall marry, or the like; if, in theſe caſes, the feoffees make a feoffment over before the contingent uſes happen to be in *eſſe*, as before *A.* have any ſon, or the man take a wife, &c. albeit it be to one that hath notice of theſe uſes, yet the uſes are deſtroyed for ever, and the feoffees cannot enter and revive * them contrary to their own feoffment: and if in theſe caſes the feoffees, before the contingent remainder veſt, be diſſeiſed, hereby the uſes are ſuſpended; but then by the re-entry of the feoffees the ancient uſes will be revived again: and therefore, if the feoffees releaſe to the diſſeiſor, and ſo bar themſelves of their entry, the uſes are extinguiſhed and ſhall not be revived, and the party grieved hath no remedy but in chancery againſt the feoffees for breach of truſt. And if the feoffees in the firſt caſe die before *A.* have any ſon born, the contingent remainder is gone: as where a feoffment is made to the uſe of the feoffor for life, and after to the uſe of the right heirs of *I. S.* in fee, and the feoffor die before *I. S*; in this caſe, the remainder is gone, for a remainder cannot be without a particular eſtate, no more of a uſe than of an eſtate made in poſſeſſion: and ſuch a remainder muſt veſt during the particular eſtate, or at leaſt *eo inſtanti* when the particular eſtate doth end (2). Co. 1. Chudleigh's caſe.

* P. 524.

If a feoffment be made to the uſe of *I. S.* and the wife he ſhall afterwards marry, and of the heirs male of their bodies; and *I. S.* make a feoffment of this land to another before he take a wife; hereby the contingent remainder is deſtroyed. Co. 1. 136.

If *A.* infeoff *B.* and his heirs, to the uſe of *C.* and *D.* his wife, and the heirs of the ſurvivor of them, and *C.* make a feoffment to *E.* and dieth; this feoffment doth deſtroy the contingent remainder. Hill. 2 Car. Scaccar. Adjudged.

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(1) The particular ſignification given to the word "*term*", in our ancient law books, and particularly in the Rector of *Chedington's* caſe, from which the paſſage in the text is taken, has been exploded by the court of King's Bench in the caſe of *Wright on the demiſe of Plowden* v. *Cartwright*, for the reaſons in 1 *Burr.* 282.

(2) The doctrine of contingent uſes, and the *ſcintilla juris* which remains in the feoffees to enable them to enter and reveſt the old uſes, is very fully explained in *Chudleigh's* caſe, 1 *Co.* in *Wegg* and *Villers* 2 *Rol. Abr.* 796. *pl.* 11.—*Gilbert's* Uſes, *p.* 175. and *Hales* v. *Riſley*, *Pollexfin*, 369.—there are alſo ſome very learned and ingenious obſervations on this ſubject, in *Fearne's Cont. Rem.* 3d. edit. 215 to 227.

Dier 186. When the eſtate, out of which the uſes do ariſe, is gone, the uſes are gone alſo; as if a leaſe be made to *A.* for his life, to the uſe of *B.* for his life; and *A.* die; hereby the eſtate of *B.* is gone.

Alſo uſes of lands may be gone by revocation, whereof ſee in the next part.

Co. ſuper Lit. 237. 7. 11, 12. 10. 143. 1. 110. 173. 107. Dier 372. Proviſoes and powers of revocation of uſes of lands are very frequent in voluntary conveyances (whether by feoffment or otherwiſe) that paſs land by way of raiſing of uſes, and are executed by the ſtatute of 27 *H.* 8. and the inheritances of many depend thereupon. As if a man ſeiſed of land in fee have divers ſons, and he covenant to ſtand ſeiſed of that land to the uſe of himſelf for life, and after of his eldeſt ſon in tail, and, for want of ſuch iſſue, to the uſe of his ſecond ſon in tail, *&c.* with a proviſo that it ſhall be lawful for him at any time during his life to revoke any of the ſaid uſes, and to limit and appoint other uſes, *&c.* Or if *A.* by indenture between him and *B.* his heir apparent an infant, covenant with *B.* for the advancement of his blood, *&c.* to ſtand ſeiſed to the uſe of himſelf for life, and after to the uſe of his ſaid heir apparent and the heirs male of his body, and after to the uſe of his right heirs, provided that if *A.* by himſelf or any other during his life ſhall deliver or offer to *B.* a ring of gold to the intent to * make void all the ſame uſes, that then the ſaid uſes ſhall be void, and he may limit new uſes: or if *A.* by indenture covenant with *B.* to ſtand ſeiſed to the uſe of himſelf and his wife and his daughter for their lives, and after, *&c.* provided that if the ſaid *A.* during his life and after the debts mentioned in the ſchedule annexed to the indenture ſhall be paid, ſhall be diſpoſed to determine, diſannul, change, alter, enlarge, diminiſh or make void the uſes, or eſtates, or any of them, of the premiſes or any part thereof, and by writing indented under his hand and ſeal ſubſcribed in the preſence of three witneſſes ſhall declare his mind to be ſo, that then the ſame uſes ſhall be void; all theſe, and ſuch like proviſoes, being coupled with a uſe, are allowed to be good and not repugnant to the former eſtates. But in caſe of ſuch a feoffment or other conveyance, whereby the feoffee or grantee is in by the common law, as where *A.* doth infeoff *B.* and his heirs to the uſe of *B.* and his heirs, it is ſaid ſuch a proviſo is meerly repugnant and void. And as touching theſe proviſoes or revocations, theſe things are to be known; 1. Theſe revocations are favorably interpreted, becauſe many mens inheritances depend upon it: and therefore he that hath this power may revoke part of the uſes at one time, and part at another time; and the revocation of the old may be made, by the making of new uſes without any expreſs revocation; and by the ſame conveyance whereby the old uſes be revoked, the new uſes may be created and limited, and then the former uſes do ceaſe *ipſo facto* by this revocation without any entry or claim (1): as if one covenant to

9. Where a power to revoke uſes of land ſhall be good, and how they ſhall be taken; and what revocation by reaſon of ſuch power ſhall be good, and what not.

* P. 525.

(1) A power of revocation if executed of the *whole* eſtate, can be executed but once, and not *toties quoties*:—but if the perſon to whom the power of revoking the old uſes and of limiting new ones is reſerved, does, in the deed of revocation, annex a power of revoking the uſes thereby declared, it will be good, and he may afterwards execute that power accordingly.—*Hele* v. *Bond*, *Prec. in Canc.* 474.——A perſon who has a power of revocation, may revoke *part* at one time and *part* at another, but not the *ſame part twice*, unleſs he reſerves a *new* power of revocation. 1 *Co.* 173. b.—2 *Burr.* 1148.

ſtand

ſtand ſeized to the uſe of himſelf and his wife, for their lives, and after to the uſe of *A.* his daughter for life, and after to the uſe of *B.* his daughter in tail, *&c.* provided that if he ſhall be minded, *&c.* he may by writing, *&c.* make void the ſame uſes, and declare the uſes to others, and he doth make void the uſe to his wife at one time and no more, and after by a deed doth limit and appoint new uſes of the whole by a new covenant to ſtand ſeized to other uſes; theſe are good revocations; for there needs no real and expreſs revocation of former uſes, but the creating of new uſes is in law an actual revocation of the old uſes, as the making of a latter is *ipſo facto* a revocation of a former will. 2. The proviſo muſt for the ſubſtance of it be purſued in the revocation, and all incident circumſtances thereof muſt be obſerved, as ſealing, ſubſcription of names, witneſſes, and the like; otherwiſe the revocation will not be good. And therefore if the proviſo be, that if the covenantor ſhall be minded to revoke, and ſhall declare his mind by writing indented under his hand and ſeal, delivered before three witneſſes, the uſes ſhall be void; in this caſe a revocation by word without writing, or by a writing and not indented, or by writing indented and not under hand and ſeal, or under hand and ſeal, and * before two witneſſes only, is not good (1).

* P. 526.

And yet if a proviſo be, that if the covenantor ſhall at any time during his life by writing under his hand and ſeal delivered before two witneſſes revoke the ſame, *&c.* the old uſes ſhall be void, and the covenantor by his laſt will and teſtament in writing under his hand and ſeal before two witneſſes doth give the land to another, and make no expreſs revocation of the former uſes; this is a good revocation in law. If the proviſo be, that if the covenantor be minded at any time during his life to revoke the ſame uſes, *&c.* and ſhall pay or tender to *A. B.* twenty ſhillings in ſuch a place; in this caſe, tender of this twenty ſhillings in that place, at any time, is not good, unleſs he happen to meet with *A. B.* at the place, for then tender at any time is good; but otherwiſe the covenantor muſt give notice to *A. B.* what time he will tender the twenty ſhillings in that place, otherwiſe the revocation is not good. If one be to marry his daughter to the ſon of another man, and they do mutually covenant to ſtand ſeiſed of their lands to the uſe of their ſon and daughter, with proviſo to revoke the uſes with the conſent of the mothers, if they or either of them be then living, and one of them die; in this caſe a revocation, by the conſent of the ſurviving mother is ſufficient. 3. When the covenantor doth make void ſuch uſes by virtue of ſuch a revocation, he is ſeiſed again of the land in fee-ſimple, as he was at

Trin. 18 Jac. Co. B. Tibbet & Lea's caſe.

Co. 8. 92 1.

Trin. 18 Ja. B. R. Savil & Sterling's caſe.

(1) But in various caſes, where all the circumſtances requiſite to a revocation are not ſtrictly purſued according to the power, *equity* will give relief.—where a man made a ſettlement with power of revocation by any writing under his hand and ſeal in the preſence of three witneſſes, and afterwards made his will under his hand and ſeal, reciting his power and declaring that he revoked the ſettlement; there were only two ſubſcribing witneſſes, though a third was preſent who died; the chancellor declared this to be "an execution of the power in ſtrictneſs, though the third witneſs did not ſubſcribe—and that if there "had not, equity ſhould help it in ſuch a little circumſtance where the owner had fully declared his "intention: where a man has power to make leaſes, *&c.* which ſhall charge and incumber a third perſon's "eſtate, ſuch powers are to have a rigid conſtruction; but where the power is to diſpoſe of a man's "own eſtate, it is to have all the favor imaginable" 2 *Vent.* 350.———Equity will relieve, where a man is prevented by the fraud of any one from peruſing all the circumſtances in the power,—or where he is prevented by accident, or by the act of God, or by neceſſity; and equity will aid a defective execution of a power, in many inſtances, pointed out in *Com. Dig.* Chancery (4 O.)—*Poiar* (C).—*Vin. Abr.* Powers (A. 17.)—(C.)

Co. 1. 112, 113. super Lit. 237.

first, without any entry or claim. 4. This power of revocation, whether it be preſent, as thoſe before and moſt are, or future, as when they are upon a contingent, as if the covenantor over-live *I. S.* or the like, when it is reſerved to the party himſelf that made the uſes, may by his fine, or feoffment, be utterly extinguiſhed; as if he make a feoffment, or levy a fine of the land whereunto the uſes and proviſo are annexed; by this the proviſo is extinct; and yet ſo, as if he make a feoffment, or levy a fine of part of the land only, this ſhall extinguiſh his power but to that part only (1): but if the power be reſerved to a ſtranger, it ſeems the fine or feoffment of him that made it, will not extinguiſh it (2). This power alſo, when it is preſent, may be extinguiſhed by a releaſe, made by him that hath the power, to any one that hath any eſtate of frank-tenement in the land in poſſeſſion, reverſion, or remainder; or it may be avoided by defeaſance, whether it be preſent or future (3).

Defeaſance.

Cromp. Jur. 48. 59. 58. 54. Dier 160. Fitz. Accompt 122.

If one convey his lands to certain friends in truſt, to the intent that they ſhall convey it to ſuch perſons as he ſhall ſet down in his laſt will and teſtament; or if a man deliver money to a friend in truſt to purchaſe land for him and his heirs, to the end that he may have the profits thereof for his life, and to the end * it may be conveyed to them afterwards (4): or if a man deliver money to his friend to buy land for him that doth deliver the money in his own name; or if a man enfeoff his friend, and his heirs, of land, to the intent that he ſhall alien the land to whom *I. S.* ſhall appoint; or if land be conveyed to me in mortgage, and I pay all the mortgage money, but I, to prevent the jointure of my wife, or for ſome ſuch like cauſe, name a friend joint purchaſer with me, and ſo the conveyance is made to us both; if in any of theſe caſes, or in any other ſuch like caſe, the friends truſted prove falſe, and do not perform the truſt, but turn the profits of the land to their own uſe, or refuſe to ſettle it according to the truſt, or the like, the party grieved muſt have his remedy in chancery; for theſe are not truſts or uſes within the ſtatute, nor ſuch for which there is any remedy at the common law; and in that caſe where the land is ſettled, to the intent that the friends truſted ſhall ſettle it where *I. S.* ſhall appoint, if *I. S.* do not appoint how it ſhall be ſettled, it ſeems the feoffees ſhall have it to their own uſe (5).

10. Other truſts and confidences of lands and of chattels real and perſonal, the nature of ſuch truſts, the duty of them that are truſted, and the remedy to be had againſt them for breach of their truſt.

* P. 527.

Cromp. Jur. 65. Dier 369. Bro. Feoffment all uſe 60.

And if a man give or grant his goods or chattels, as leaſes for years, or the like, to friends in truſt to the uſe of himſelf for life, and after to perform his will, or the like; theſe are ſuch

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(1) *A.* being ſeiſed in fee made a conveyance to himſelf for life, remainder to his firſt and other ſons in tail, remainder over, remainder to his own right heirs, with a power by deed, ſealed in the preſence of two witneſſes, to revoke theſe uſes, and to limit new ones. After this *A.* levied a fine, and a week after the fine levied by deed declared, that the intent of the parties at the time of levying the fine was, that the fine ſhould be to the uſe of *A.* and his heirs, and to no other uſe; and the queſtion was, whether this fine had extinguiſhed the power of revocation, ſo that the declaration of uſes came too late. Adjudged, that the power of revocation was extinct; but this judgment in *C. B.* was reverſed in the Exchequer Chamber by ſix judges againſt two. *Herring* v. *Brown.*—*Skin.* 185.

(2) See accordingly in the caſe of *Willis* v. *Shorral* in 1 *Atk.* 474.

(3) See more amply as to the nature of powers of revocation—How they ſhould be framed, in what manner they are to be executed, and how they may be extinguiſhed or deſtroyed, in *Bac. Abr.* Uſes and Truſts (G.) 2 *Bl. Com.* 335.—*Com. Dig.* Uſes (L. 2.)—*Vin. Abr.* Powers (E.)—and the opinion at the end of this chapter.

(4) Where money is agreed or directed to be laid out in the purchaſe of lands to be ſettled to ſuch and ſuch uſes, every perſon intereſted ſhall have the ſame benefit, if the parties die without a ſettlement, as he would have had if the lands had been ſettled.—2 *Pr. Wms.* 174.

(5) But in equity, in this caſe the feoffees would be truſtees for *I. S.*—See the note to fol. 482. before.

uſes and truſts as are not within the ſtatute of uſes, and for the breach of which there is no remedy at the common law but in chancery only. So if an obligation or ſtatute be made to *A. B.* to the uſe of *C. D.* this is a truſt of the ſame nature; and if *A. B.* releaſe the obligation without the conſent of *C. D.* or get the money into his own hands, *C. D.* ſhall have relief in chancery; and in all theſe and ſuch like caſes, the general rules, by which uſes were governed at the common-law, are ſtill in force, and to take place as thoſe by which uſes and truſts are now for the moſt part governed. As firſt, if there be any cauſe to ſue for or about the lands or goods wherewith the parties are truſted, as if they deny or delay to perform the truſt, they muſt be compelled thereunto by ſuit in chancery. Secondly, the *ceſtuy que uſe*, or party for whom the truſt is, cannot of himſelf diſpoſe of the lands or goods, for the property and intereſt in law is in the truſtees; and if it be an obligation or ſtatute that is made to the uſe of another, *ceſtuy que uſe* cannot releaſe it, but the truſtee muſt releaſe it. Thirdly, if the party truſted ſo with lands, goods, or chattels, give, grant, or ſell the ſame lands, goods, or chattels, to one that hath knowledge of the ſame uſes or truſts, (as it is always preſumed he hath where the truſts are expreſſed upon the ſame deed, by which the lands, goods, or chattels are given or granted;) or if the thing, ſo given or granted, be granted upon the ſame truſts, or to the ſame uſes, or without any conſideration at all; in theſe * caſes, he to whom the thing whereabout the truſt is, ſhall have the ſame thing upon the ſame truſt and to the ſame uſe, as he that did give or grant the ſame had it. But in caſe, where no truſt or uſe is expreſſed upon the deed, and the purchaſor or buyer hath no notice or knowledge of the uſe or truſt, and he gives a valuable conſideration for the thing, there for the moſt part the ſale is good, and the party grieved thereby hath no remedy but againſt the party firſt truſted in Chancery; and the purchaſor ſhall have and enjoy the thing ſo bought to his own uſe for ever; but he that is the party truſted, will be forced in Chancery to make the party grieved an amends in damages for this breach of truſt; and if there be any practiſe, packing, or combination between the buyer and the ſeller in the matter, there perhaps the ſuit may hold them both, and the buyer may be forced to reſtore the thing itſelf. And yet if *A.* enter into a ſtatute to *B.* and *C.* to the uſe of *B.* and *A.* having notice of this uſe doth get a releaſe from *C.* in this caſe it ſeems *B.* muſt have his whole remedy againſt *C.* and ſhall have no remedy againſt *A.* 4. If the truſtor or *ceſtuy que uſe* in theſe caſes commit felony, *&c.* ſo that the things if he had the property of them were forfeit; in this caſe, it ſeems that neither they nor their heirs, executors, *&c.* nor yet the Lord, *&c.* ſhall have them, but the truſtees ſhall keep them for ever. 5. If the *ceſtuy que uſe* or truſtors die and appoint how the ſame thing ſhall be diſpoſed of, the truſtees are bound to ſee it done; as if the teſtator appoint it ſhall pay his debts, or provide legacies, the parties truſted muſt take care it be ſo imployed; and in this caſe, the debtees and legatees alſo may compel the truſtees in Chancery. 6. In all theſe caſes regularly the thing whereof the truſt is, is in equity at the diſpoſing of him that is the *ceſtuy que uſe*, unleſs he do otherwiſe appoint it; and if at his death

Cromp Jur. 62. 45. 11 Ed. 4. 2.

7 Ed. 4. 29.

7 Ed. 4. 29. Cromp. Jur. 62, 63. 65. 11 Ed. 4. 24 Ed. 4. 37.

* P. 528.

11 Ed. 4. 8.

Bro. Feoffmental uſe 34.

15 H. 7. 12. Cromp. Jur. 54.

Dier 49.

he make no diſpoſition thereof it ſhall go to his heir, exe-
1 H. 7. 11. cutor, &c. 7. In all theſe caſes the truſtees ſhall have their reaſonable allowance in Chancery for whatſoever they have laid out about the land, &c. in ſuits or otherwiſe for the profit of the truſtor. Out of all which may appear how dangerous it is for a man to meddle with any lands, goods, or chattels ſo conveyed or ſettled in truſt; for the *ceſtuy que uſe* or truſtors have no property in the thing, and therefore they cannot ſell or give it, and the truſtee hath it but to another's uſe; and it is not ſafe therefore to deal with either of them alone, nor yet indeed ſafe to deal at all in theſe caſes, unleſs the buyer may have the conſent, ſale, and aſſurance, or the releaſe, &c. of the truſtors and truſtees * altogether; and if there be any woman covert, or infant, within the truſt, it is moſt of all * P. 529.
2 Ed. 6. 14. Fitz. Subpœna 5. dangerous. And if goods or chattels be given to, or to the uſe of, a feme covert, or infant, and certain friends are truſted therewith, if they do ſell or give away theſe goods or chattels contrary to the truſt, they muſt be ſure to anſwer it: if therefore they ſell them, let them ſee that the money made thereof be as beneficial, and be beſtowed for the wife or children; for it ſeems it is not ſufficient in this caſe, that the money made thereof be paid to them.

The editor thinks he cannot conclude the few notes he has ventured to add to this very excellent and conciſe treatiſe on uſes, in any manner more acceptable to the reader, than by ſubjoining a copy of an elaborate opinion of the late Mr. *Booth* on the operation of the ſtatutes of uſes, the doctrine of executory fees, and powers of revocation.

CASE.

A. Tenant in tail and her huſband, by articles previous to their marriage, agree to ſettle an eſtate to uſes.—*A.* and her huſband join in making a tenant to the precipe and ſuffering a recovery, and declare the ſame to ſuch uſes, as they, or the ſurvivor of them, ſhould by deed or will appoint.—Then, in purſuance of the articles, they make a ſettlement, and appoint the premiſes, to the uſe of the intended huſband for life, remainder to his wife for life, remainder to truſtees to preſerve the contingent remainders, remainder to the uſe of the articles—reſerving a power to the two truſtees to preſerve remainders, in whom no eſtate was then veſted but by way of remainder, to ſell and convey, ſo as the money be laid out in the purchaſe of other lands to be ſettled to the ſame uſes.

Can ſuch truſtees convey a good eſtate in fee to a purchaſer under the power, having no eſtate veſted in them?

By the old law no fee-ſimple could be limited upon or after a fee-ſimple; but ſince the ſtatute of uſes, executory fees, by way of uſe, have not only been allowed, but are become frequent in all conveyances, operating by way of tranſmutation of poſſeſſion, the uſes are ſerved out of the ſeiſin of the feoffees, grantees, releaſees, &c.—In all future or executory uſes, there is, the inſtant they come in *eſſe*, a ſufficient degree of ſeizin ſuppoſed to be left in the feoffees, grantees, &c. to knit itſelf to, and ſupport thoſe uſes; ſo as that it may be truly ſaid, the feoffees or grantees ſtand ſeiſed to thoſe uſes, and then, by the force of the ſtatute, the *ceſtuy que uſe* is immediately put into the actual poſſeſſion.—It is wholly immaterial how, or by what means, the future uſe comes in *eſſe*; whether by means of ſome event provided for, in caſe it happened, in the creation of the uſes, which event may be called the act of God; or by means of ſome work performed by any certain perſon, for which proviſion was likewiſe made, in the creation of the uſes, which may be called the act of man; in either caſe, the ſtatute operates the ſame way; for the inſtant the future uſe comes in *eſſe*, either by the act of God, or by the act of man, the ſtatute executes the poſſeſſion to the uſe, and the *ceſtuy que uſe* is deemed to have the ſame eſtate in the lands as is marked out in the uſe, by the deed that created it. When the uſe ariſes from an event provided for by the deed, it is called a future, a contingent, an executory uſe; when it ariſes from the act of ſome agent or perſon nominated in the deed, it is called, a uſe ariſing from the execution of a *power*. In truth both are future or contingent uſes till the act is done; and afterwards they are, by the operation of the ſtatute, actual eſtates.—But till done they are in ſuſpence, the one depending on the will of Heaven whether the event ſhall happen or not, the other on the will of man.

Whilſt theſe laſt are in ſuſpence, they are called *powers*: It is abſolutely immaterial to the creation of the powers, whether they are reſerved to the parties that created the uſes, or to any one having any actual uſe or eſtate under any limitation in the deed of uſes, or to the feoffees, grantees, or releaſees, or to an abſolute ſtranger.—They all operate the ſame way; indeed they have different names according as they are reſerved to the perſons aforeſaid, and different rules are eſtabliſhed for their interpretation, as they are of one kind, or another.—Some are powers appendant, ſome are powers in groſs, ſome are powers collateral; but ſtill the ſtatute

ſtatute executes the poſſeſſion to the uſe that ariſes on their execution, in the ſame manner, and by the ſame method of operation. Sir *Thomas Jones* 110. *How* and *Wingfield*.

Every ſettlement, made with ſkill for theſe laſt hundred years can furniſh ſomething by way of example to illuſtrate theſe principles.—Take a ſettlement made before the ſtatute of K. *Wil.* 3d. to enable poſthumous children to take as if born in the life of the father; you will find it perhaps thus, To the uſe of the intended huſband and his heirs till the intended marriage,—after the marriage, To the uſe of the ſaid huſband for life,—remainder to truſtees for his life to preſerve contingencies, remainder to the uſe of ſuch huſband's firſt and other ſons born in his life-time in tail, remainder to the intended wife enceint at his death, and her aſſigns till the birth of one or more poſthumous ſons, and from and after the birth of any ſuch poſthumous ſons, to every of them ſucceſſively in tail, and for default of ſuch iſſue, to the uſe of all and every the daughters of the huſband as tenants in common in tail, with remainders over; and with powers for the huſband during his life to make leaſes, and powers for the guardians of the infant ſon when their eſtates take effect in poſſeſſion, in like manner to make ſuch leaſes, *&c.*

Here, under the limitations of theſe, and ſuch like ſettlements, you will find the uſes continually to vary, and all to ariſe out of the ſeizin of the releaſees; before marriage the intended huſband is ſeized in fee; then upon the marriage his eſtate in fee ceaſes, and a new uſe ſprings up, under which he is tenant for life, with the further uſes in contingency;—then on the birth of a ſon, that ſon becomes tenant in tail, and alſo on the birth of every other ſon a new uſe or eſtate in remainder ſprings up to every ſuch ſon in tail; on the birth of a daughter, ſhe becomes intitled by way of uſe to a remainder in tail; on the birth of another daughter, that laſt remainder in tail ceaſes, and both daughters become intitled by way of uſe to a tenancy in common in remainder in tail. Then if the huſband dies leaving a child in *ventre matris*, a uſe veſts in the mother till the birth of that child, and then that uſe deveſts, and the ſame event carries an eſtate tail to that child. So where the father makes a leaſe under his power, a uſe veſts in the leſſee for ſuch eſtate as the leaſe gives, and ſuch leſſees uſe or eſtate takes place before and ſettles itſelf over all the uſes; it is the ſame as a leaſe made by a guardian to any of the infant children, (which guardian is a perfect ſtranger to the parties at the time of the original ſettlement,) there the uſe or eſtate, given by the leaſe made under the power, over-reaches all the other uſes, and takes place before them; and this is done by the operation of the ſtatute, juſt in the ſame way as any other uſe would ariſe, under any of the limitations contained in the ſettlement.

Feoffment to *A.* and his heirs, and if *B.* pays 100*l.* to *I. S.* then to the uſe of *B.* and his heirs; here on the payment of the money the eſtate of *A.* ceaſes, and the uſe executes in *B.* and his heirs.—This caſe is cited in many books, and the caſe of *Lloyd* and *Carew*, in *Sh.* P. C. 137, 138. is to the ſame effect.

A. levies a fine of the manors of *D.* and *S.* and declares the uſe by deed, as to the manor of *D.* to the uſe of *B.* and his heirs, and as to the manor of *S.* to the uſe of *A.* and his heirs, till *B.* or his heirs are evicted by the wife of *A.* of the ſaid manor of *D.* and after ſuch eviction, to the uſe of *B.* and his heirs: this is a contingent uſe of the manor of *S.* ſo that a uſe will veſt in *B.* whenever any eviction happens, and then the uſe in *A.* ceaſes.—2 *Rol. Abr.* 792.—In ſettlements on younger ſons of peers or of dignified perſons, there are frequently proviſions that if ſuch a dignity, or ſuch a family eſtate, deſcends on them, then the uſe to them to ceaſe as if they were dead without iſſue, and then the premiſes to go over to the next in remainder; this is an actual revocation, when the contingency happens.

It remains only to ſhew, that not only the happening of an event by the act of God, but alſo the performance of any particular act by a ſtranger, will deveſt an old uſe, and give birth to and eſtabliſh a new one.

Now powers of revocation do in their execution operate this way, and do deveſt or repeal and determine the old uſes, and ſet up and eſtabliſh new ones. The execution of theſe new uſes is by force of the ſtatute, juſt as the execution of contingent or future uſes.—The books ſay that when a power is executed it becomes a limitation; but as theſe powers of revocation are in fact generally reſerved to the grantors as firſt owners of the eſtate, it may be proper to ſhew that the books make no diſtinction, but allow all kinds of powers to be limited to ſtrangers; and nothing ſuits this purpoſe better than to cite the words of Lord *Hale*, in the caſe of *Edwards* and *Slater* in *Hardres* 410, 415.—Powers to raiſe eſtates are either *ſimply collateral*, as where a party that hath ſuch powers has not even had any eſtate in the land, as where ſuch power is reſerved to a ſtranger, and there it cannot be deſtroyed by ſuch ſtranger, becauſe it is but a bare nomination; or *not ſimply collateral*, which are of ſeveral ſorts, not material to this purpoſe.

Here you ſee Lord *Hale* takes it for granted that a power to raiſe uſes may be reſerved or limited to a perfect ſtranger.

Lord *Coke*'s opinion in *Co. Lit.* 237. is the ſame; he tells you that powers in voluntary ſettlements are founded on the ſtatute which executes them as uſes; then he explains the *nature of powers of revocation of uſes*, and what conſequences are incident thereto, as that they may be releaſed or extinguiſhed when reſerved to the original grantor, or to any one claiming any eſtate or intereſt in the deed; but he ſaith, if he that hath power of revocation, *hath no preſent* intereſt in the land, nor by the ceſſor of the eſtate *ſhall have nothing*, then his feoffment, fine, *&c.* of the land is no extinguiſhment of his power, becauſe it is meerly *collateral to the land*.—If a power to revoke uſes may be reſerved to a ſtranger, a power to raiſe or appoint future uſes for a particular purpoſe may ſurely be reſerved to a ſtranger too.

The reſerving of powers of revocation to the grantors or original owners of the land, though chequed by requiring the conſent of the truſtees, hath of late been diſuſed in ſettlements, becauſe doubts have ariſen whether ſuch ſettlements are not fraudulent within the ſtatute of 27 *Eliz.*—See Sir *Thomas Jones* 94, 95, *Butler* and *Waterhouſe*.

Powers to enable grantors or owners to revoke, or to ſell or convey in exchange,—*firſt ſettling other lands of equal value to the ſame uſes*, have been found inconvenient; becauſe, though it may be eaſy to ſell an eſtate and lay out the money in the purchaſe of a new one, yet it is by now means eaſy to ſettle a new eſtate, before you have ſold the old one.—Few people are in circumſtances to buy new eſtates, till they have ſold their old ones.

But the veſting a power in the releaſees (who themſelves have a *ſcintilla juris* to ſerve and feed the uſes when they ariſe) to ſell and convey, and *adding that when they receive the purchaſe-money, and ſign a receipt for the ſame under their hands, the releaſees ſhall ſtand ſeized, and the conveyances ſhall enure To the uſe of the purchaſers in fee*, with proper truſts concerning the laying out the purchaſe-money; this anſwers every purpoſe. I found this method uſed and practiſed by Mr. *Ward* and others long before my being in buſineſs, and I always uſe this method to this day.

J. BOOTH, *Lincoln's-Inn*, 23d *June*, 1761.

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